TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~254~~ 34.

THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

PAUL RIGGS AND EUGENE DE HART, EXECUTORS OF THE ESTATE OF EBER B. ROLOSON, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JUNE 5, 1905.

(19,787.)

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UNITED STATES OF AMERICA, *Set:*

e Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri.

it remembered, that there was filed in the office of the Clerk of ircuit Court for the St. Joseph Division of the Western District ssouri, on the 10th day of November, A. D. 1904, a transcript the Circuit Court of De Kalb County, Missouri, in the case of Riggs and Eugene De Hart, executors of the last will and testa- of Eber B. Roloson, late of De Kalb County, deceased, *vs.* The nwestern National Life Insurance Company, in words and fig- as follows, to-wit:

E OF MISSOURI, *County of De Kalb, ss:*

In the Circuit Court, October Term, 1904.

. RIGGS and EUGENE DE HART, Executors of the Last Will and stament of Eber B. Roloson, Late of De Kalb County, Missouri, ceased, Plaintiffs,

vs.

NORTH WESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

aintiffs state that Eber B. Roloson, late of the village of Weath- in the County of De Kalb and State of Missouri, at his said of residence, on the 28th day of February, 1903, departed this leaving a will, by the terms of which the plaintiffs herein, Paul s and Eugene De Hart, were appointed executors of his said that said will was thereafter duly admitted to probate in the ate Court of De Kalb County, Missouri, and letters testamentary by said court issued to these plaintiffs as executors of said will and of his estate; and the said plaintiffs are now, and ever since the 4th day of March, 1903, have been, the duly ap- pointed, qualified and acting executors of the will and estate id Eber B. Roloson, deceased.

aintiffs further state that the defendant is a corporation duly ed, organized and existing under and by virtue of the laws of tate of Minnesota, with headquarters at the City of Minneapolis id state, for the purpose of engaging in and carrying on the ess of making assurance upon the lives of individuals as a joint company, and was so incorporated at all of the times herein- mentioned.

at said insurance company has complied with the laws of the of Missouri, which entitles it to do business in the State of uri, and is authorized, and at all of the times hereinafter men- d, was authorized to do business in the State of Missouri. That aid defendant by its certain contract and obligation in writing e nature of a life insurance policy, herewith filed, entered into

and delivered to the aforesaid Eber B. Roloson at the County of De Kalb in the State of Missouri, he being then a resident of said County, dated the 21st day of November, 1901, for value received and in consideration of the certain premiums provided for in said policy to be thereafter paid to it by the said Roloson, agreed with the said Eber B. Roloson that at his death and within ninety days after the date of acceptance by the directors of said company of satisfactory evidence of his death, they would pay to the estate of the said Eber B. Roloson the sum of five thousand dollars.

That said Eber B. Roloson in his life time performed all the obligations on his part required by the terms of the said contract, and paid all premiums which accrued thereon.

That on the 16th day of March, 1903, the plaintiffs as executors as aforesaid, gave to the defendant notice of the death of the said Eber B. Roloson and furnished to the said company at its office in Minneapolis, Minnesota, proofs of the death of the said Eber B. Roloson in such form as was demanded and required of them by said defendant, which proofs showed conclusively and were
3 verified by affidavit that the said Eber B. Roloson died at Weatherby, De Kalb County, Missouri, on the 28th day of February, 1903. That the death of the said Eber B. Roloson was from natural causes. That after the death of the said Eber B. Roloson, and upon furnishing proofs as aforesaid, and after the lapse of ninety days from the furnishing of such proofs of death, the plaintiffs demanded of the defendant that it pay to them for, and on behalf of the estate of the said Eber B. Roloson the said sum of five thousand dollars, the amount owing to them by the terms of the said policy, but that the defendant has failed and refused to pay said sum of five thousand dollars, or any part thereof. That said sum of five thousand dollars is unpaid, due and owing to them as executors as aforesaid, together with interest thereon at the rate of six per cent. per annum from the 21st day of June, 1903.

Plaintiffs therefore pray judgment against the defendant for the said sum of five thousand dollars with interest thereon, from the 21st day of June, 1903, at the rate of six per cent. per annum and for all proper orders and judgments in the premises.

4 Second Count.

Plaintiffs for a second and further cause of action against the above named defendant state that Eber B. Roloson, late of the village of Weatherby, in the County of De Kalb and State of Missouri, at his said place of residence, on the 28th day of February, 1903, departed this life, leaving a will, by the terms of which the plaintiffs herein, Paul Riggs and Eugene De Hart, were appointed executors of his said last will; that said will was thereafter duly admitted to probate in the Probate Court of De Kalb County, Missouri, and Letters testamentary were by said court issued to these plaintiffs as executors of said will and of his estate; and the said plaintiffs are now, and ever since the 4th day of March, 1903, have been, the duly appointed,

qualified and acting executors of the will and estate of said Eber B. Roloson, deceased.

Plaintiffs further state that the defendant is a corporation duly created, organized and existing under and by virtue of the laws of the State of Minnesota with headquarters at the City of Minneapolis, in said State, for the purpose of engaging in and carrying on the business of making assurance upon the lives of individuals as a joint stock company, and was so incorporated at all of the times hereinafter mentioned.

That said insurance company has complied with the laws of the State of Missouri, which entitles it to do business in the State of Missouri, and is authorized, and at all of the times hereinafter mentioned was authorized to do business in the State of Missouri.

That the said defendant by its certain contract and obligation in writing in the nature of a life insurance policy, herewith filed, entered into and delivered to the aforesaid Eber B. Roloson, at the County of De Kalb, in the State of Missouri, he being then a resident of said County, dated the 14th day of May, 1902, for value received and in consideration of the certain premiums provided for in said policy to be thereafter paid to it by the said Roloson, agreed with the said Eber B. Roloson that at his death and within ninety days after the date of acceptance by the directors of said company of satisfactory evidence of his death, they would pay to the estate of the said Eber B. Roloson the sum of Five Thousand Dollars.

That said Eber B. Roloson in his lifetime performed all the obligations on his part required by the terms of the said contract, and paid all premiums which accrued thereon.

That on the 16th day of March, 1903, the plaintiffs as executors aforesaid, gave to the defendant notice of the death of the said Eber B. Roloson and furnished to the said Company, at its office in Minneapolis, Minnesota, proofs of the death of the said Eber B. Roloson, in such form as was demanded and required of them by said defendant, which proofs showed conclusively and were verified by affidavit that the said Eber B. Roloson died at Weatherby, De Kalb County, Missouri, on the 28th day of February, 1903. That the death of the said Eber B. Roloson was from natural causes.

That after the death of the said Eber B. Roloson, and upon furnishing proofs as aforesaid, and after the lapse of ninety days from the furnishing of such proofs of death, the plaintiffs demanded of the defendant that it pay to them for, and on behalf of the estate of the said Eber B. Roloson, the said sum of five thousand dollars, the amount owing to them by the terms of said policy, but that the defendant has failed and refused to pay the said sum of five thousand dollars, or any part thereof. That said sum of five thousand dollars unpaid, due and owing to them as executors as aforesaid, together with interest thereon at the rate of six per cent. per annum from the 1st day of June, 1903.

Plaintiffs therefore pray judgment against the defendant for the said sum of five thousand dollars with interest thereon, from the

21st day of June, 1903, at the rate of six per cent. per annum and for all proper orders and judgments in the premises.

R. A. HEWITT &
J. T. BLAIR,
W. H. HAYNES,
W. M. FITCH,
K. B. RANDOLPH,
Attorneys for Plaintiffs.

6 Upon the filing of the said petition, a Summons as issued and directed to the Sheriff of Cole County, Missouri, and delivered to the Commissioner of Insurance, Jefferson City, Missouri, which said petition was in words and figures as follows, to-wit:

Summons.

STATE OF MISSOURI, *County of De Kalb, ss:*

In the Circuit Court.

The State of Missouri to the Sheriff of Cole County, Greeting:

We command you to summon The Northwestern National Life Insurance Company, if it be found in your County, to appear before our Circuit Court, to be holden within and for the County of De Kalb, at the Court House, in the City of Maysville, in said County, on the first day of the next term thereof, to be begun and held on the second Monday in October next, A. D. 1904, then and there, before the Judge of our said Court, to answer the petition of Paul Riggs and Eugene De Hart, Executors of the last will and testament of Eber B. Roloson, late of De Kalb County, Missouri, deceased.

And have you then and there this writ, with the return of your action thereupon.

Witness my hand as clerk of our said Court and the seal thereof. Done at office in the City of Maysville, in the county aforesaid, on the 21st day of September, A. D. 1904.

[SEAL.]

ANDREW J. McCOY, *Clerk.*

7 In the Circuit Court for De Kalb County, Missouri, October Term, 1904.

PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eber B. Roloson, Late of De Kalb County, Missouri, Deceased, Plaintiffs,

vs.

THE NORTH-WESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

Petition for Removal to the United States Court.

Your petitioner, The Northwestern National Life Insurance Company respectfully shows:

1. That this suit was begun in the Circuit Court of De Kalb County, Missouri, on or about the 21st day of September, 1904, by plaintiffs, by filing in the office of the Clerk of said Circuit Court a petition and by serving upon the defendant a writ of summons; that said cause is still pending and undetermined and that the term of said Circuit Court to be begun and held in the City of Maysville, Missouri, in said County of De Kalb, on the 10th day of October, 1904, is the first term at which said cause may be tried; that said cause has not been tried and that the defendant, The Northwestern National Life Insurance Company, has not answered to plaintiffs' petition, and is not required, under the laws of this State or the rules of said Circuit Court to answer or plead to the plaintiffs' petition until the 10th day of October, 1904.

2. That said action is founded upon an alleged liability of the defendant upon contracts or policies of insurance alleged to have been made and issued by defendant upon the life of Eber B. Roloson, since deceased, in the sum of five thousand dollars ($5,000.00) each; that plaintiffs claim in their petition that defendant is liable to them upon each said contract or policy of insurance in the sum —

8 five thousand dollars; and that the matter in dispute in said controversy exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, to-wit, ten thousand dollars.

3. That this action involves a controversy between citizens of different states. That the plaintiffs Paul Riggs and Eugene DeHart and each of them were at the time of commencement of this action, and at all times since have been, and now are citizens and residents of the State of Missouri and not *and not* citizens or residents of the State of Minnesota. That the defendant, The Northwestern National Life Insurance Company, is a corporation, duly organized and existing under and by virtue of the laws of the state of Minnesota, having its principal place of business in the City of Minneapolis, in said state of Minnesota, and was at the time of the commencement of this action, and still is, a citizen of said State of Minnesota, and not a citizen or resident of the State of Missouri.

4. Your petitioner offers herewith a bond with good and sufficient security for the entering in the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, on

the first day of its next session a copy of the record in this action, and for paying all costs that may be awarded by said Circuit Court, if said Circuit Court shall hold that this action was wrongfully or improperly removed thereto, and also for its appearing and entering special bail in said suit, if special bail was originally required therein.

Wherefore your petitioner prays that this action may be removed into the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, and that this court proceed no further herein.

H. A. KERR AND
BROWN & DOLMAN,
Attorneys for Defendant.

9 STATE OF MISSOURI, *County of Buchanan, ss:*

John E. Dolman, of lawful age, being first duly sworn upon his oath deposes and says that he is agent and attorney of the above named defendant, The Northwestern National Life Insurance Company, and as such makes, and is authorized to make this affidavit; that he has read the foregoing petition and knows the contents thereof and that the averments and allegations are true as he verily believes.

JOHN E. DOLMAN.

Subscribed and sworn to before me this 30th day of September, 1904.

LENA BROWN,
[SEAL.] *Notary Public.*

My Commission will expire March 22nd, 1906.

10 In the Circuit Court for De Kalb County, Missouri, October Term, 1904.

PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eber B. Roloson, Late of De Kalb County, Missouri, Deceased, Plaintiffs,

vs.

THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

We, The Northwestern National Life Insurance Company as principal and the Title Guaranty and Trust Company as surety, are held and firmly bound unto Paul Riggs and Eugene De Hart, executors, the above named plaintiffs, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to said Paul Riggs and Eugene De Hart, executors, their successors, executors, or administrators, for which payment, well and truly to be made, we bind ourselves, our successors, representatives and assigns, and our executors and administrators, jointly and severally, firmly by these presents.

Upon this condition: Whereas, on or about the 21st day of September, 1904, an action was brought by said Paul Riggs and Eugene De Hart, executors, against The Northwestern National Life In-

surance Company in the Circuit Court of De Kalb County, Missouri, and is now pending for trial in said Circuit Court, and is removable into the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, under and by virtue of the act of Congress in such cases made and provided, and

Whereas, said The Northwestern National Life Insurance Company has filed its petition in said Circuit Court of De Kalb County, Missouri, for the removal of said action into the Circuit Court of the United States for the St. Joseph Division of the Western

11 District of Missouri, now, therefore;

The condition of the above obligation is such that if the above bounden The Northwestern National Life Insurance Company, or its successors, shall enter or cause to be entered, in said Circuit Court of the United States on the first day of the next term thereof a copy of the record in this action, and shall pay all costs that may be awarded by said Circuit Court, if said Circuit Court shall hold that this action was wrongfully or improperly removed thereto, and shall then and there enter special bail in said action if the same were originally requisite therein, and do and perform all other things required by law to be done on the removal of actions from state to United States Courts, then this obligation to be void; otherwise, to be and remain in full force and effect.

In testimony whereof, said The Northwestern National Life Insurance Company has caused this bond to be executed by J. E. Dolman, its agent and attorney, and said The Title Guaranty and Trust Co. has hereunto set its hand and seal.

Sealed with our seals and dated this 4th day of October, 1904.

[SEAL.] THE NORTHWESTERN NATIONAL INSURANCE COMPANY, [SEAL.]
By J. E. DOLMAN, *Its Agent and Attorney.*
THE TITLE GUARANTY & TRUST CO., [SEAL.]
By R. E. CULVER, *Its Attorney in Fact.*
And by A. S. McGHEE, *Its Attorney in Fact.*

12 STATE OF MISSOURI, *County of De Kalb, ss:*

October Term, 1904.

In the Circuit Cour of said County, on the 10th day of October, 1904, the following, among other proceedings, were held, viz:

PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eber B. Roloson, Late of De Kalb County, Missouri, Deceased, Plaintiffs,

vs.

THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

Comes now plaintiffs and defendant by their attorneys into Court, and the defendant files petition and bond for removal of this cause to the Circuit Court of the United States for the Saint Joseph Di-

vision of the Western District of Missouri; said petition was taken up and considered by the Court and sustained; defendant's bond in the sum of One Thousand Dollars ($1000.00) was examined by the court and approved, and this cause is removed to the United States Court for the Saint Joseph Division of the Western District of Missouri.

It is further ordered that the Clerk of this Court certify to the clerk of the United States Court, Saint Joseph Missouri, a complete transcript of all the records and files herein, and transmit them to the Clerk of the United States Court, Saint Joseph, Missouri, and that the costs of same be taxed against the defendant.

13 PAUL RIGGS ET AL.
vs.
NORTHWESTERN LIFE INS. CO.

STATE OF MISSOURI, *County of De Kalb, ss:*

I, Andrew J. McCoy, Clerk of the Circuit Court in and for said County, do hereby certify that the above is a true copy of the original files and record entries in the cause therein named, as the same appears of record and on file in my office.

[SEAL.] Witness my hand as Clerk, and the seal of said Court. Done at office in Maysville, this 7th day of November, 1904.

ANDREW J. McCOY, *Clerk.*

And afterwards to-wit, on the 6th day of March A. D., 1905, and at the regular March Term of the United States Circuit Court for the St. Joseph Division of the Western District of Missouri, the foregoing cause coming on regularly to be heard, the following proceedings were had and entered of record:

PAUL RIGGS ET AL.
vs.
NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY.

Comes now the defendant and files answer herein.

Which said answer is in words and figures as follows:

14 In the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division.

PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eber B. Roloson, Late of Weatherby, De Kalb County, Missouri, Deceased, Plaintiffs,
vs.
THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

Answer.

Comes now defendant, and answering to Count 1. of the complaint of plaintiffs herein, denies each and every allegation, matter and thing therein stated, except as hereinafter admitted.

Admits the death of Eber B. Roloson, the admission of his will to probate, and the appointment and qualification of plaintiffs as alleged.

Admits the issuance by defendant to said Roloson of a certain policy of insurance, dated November 21st, 1901, and filed in
15 this action by plaintiff, that claim has been made under said policy, and that defendant has refused to pay anything thereon.

Further answering, defendant alleges that the facts in connection with the issuance of the said policy of insurance are as hereinafter stated, and not otherwise.

That it is and has been during all of the times hereinafter mentioned a mutual insurance organization duly created and organized under and in accordance with the laws of the State of Minnesota as such, and licensed and authorized to do and doing business as such amongst other places within the State of Missouri.

That during all of the times hereinafter mentioned and long prior thereto, one Eber B. Roloson, referred to in plaintiffs' complaint herein, resided at or near the village of Weatherby, De Kalb County, Missouri, (and was insolvent, so that his entire possessions and assets and property of every kind and description were not at any time sufficient to pay his indebtedness then existing), and was and long had been seriously, dangerously and incurably sick and diseased in all parts of his mind and body and all the portions and organs thereof, and was and long had been seriously, dangerously and incurably afflicted with consumption, anaemia, rheumatism, cancer, and divers and sundry other diseases. weaknesses and ailments of the head, throat, lungs, heart, stomach, intestines, liver, kidneys and bladder, and divers and sundry other weaknesses, diseases and ailments, each and all whereof were during all of said times necessarily fatal and incurable and of such kind and nature that his death would and did necessarily and quickly result therefrom, and in consequence thereof *thereof* his physical, bodily and mental condition were such that his life was not insurable, and no insurance company knowing any of the facts aforesaid would have insured the life of said Roloson.

That all of the aforesaid was at all times well known to said Roloson, and he, knowing all the facts aforesaid, and that he was
16 about to die, did prior to the making of either of the applications hereinafter mentioned, form the design fraudulently and wrongfully by covin and misrepresentation, fraud and concealment to induce this defendant and divers other insurance companies to insure his life for large sums of money, and to borrow the money wherewith to pay premiums thereon, and to conspire and agree with divers and sundry other people who were each then and there cognizant of the facts aforesaid that he and they should do as aforesaid, and that they should assist him in so doing and to furnish the money to pay the premiums on his life insurance.

That in furtherance of the aforesaid the said Roloson did, to-wit, on the 19th day of November, 1901, make written application to this defendant for a policy of life insurance in the sum of $5,000.00 upon his life, and to induce defendant to accept said application and

issue said policy, said Roloson did warrant to defendant that each and every one of the statements and answers made in said application was full, true and complete; that no company or association had ever postponed or declined to grant insurance on his life; that no physician had ever given an unfavorable opinion upon his health with reference to life insurance or otherwise; that he had not been consulted or attended by any physician within one year prior to the date of said application; that the only disease or ailment for which he had consulted a physician within ten years had been a bilious attack; that he was then and had been for twelve months in good health and free from all ailments, diseases, weaknesses and infirmities; that he was not then and never had been subject to or predisposed to cough, expectoration, difficulty of breathing, or palpitation; that he had never had pneumonia, spitting or raising of blood, or other hemorrhages; that he had never had any illness, local disease, injury, mental or nervous disease or infirmity, or ever had any disease, weakness or ailment of the head, throat, lungs, heart, stomach,
intestines, liver, kidneys, bladder, or any disease or infirmity
17 whatsoever; that none of his parents, brothers or sisters, uncles or aunts had ever been afflicted with consumption, cancer, gout, rheumatism, or any pulmonary complaint, except one sister; and in and by said application he did further warrant and agree that each and every of said statements and warranties therein contained was material to the risk of insuring his life; that each and every of said warranties and statements was full, true and complete; that he was not afflicted with any disease or disorder, and had never had any illness, local disease or pernicious injury, and that if any of the answers, statements, or warranties contained in said application were not full, true and complete, or if any of them was in any respect untrue, then any policy thereon should be null and void, any statute or law to the contrary notwithstanding; and therein and thereby said Roloson did undertake and agree that no obligation should arise under said application until a policy of insurance should be issued and delivered to him while and if he was in good health.

That each and every of the statements and warranties aforementioned was untrue; that in fact divers and sundry companies and associations had postponed and declined to grant insurance on his life, and divers and sundry physicians had given an unfavorable opinion on his health with reference to life insurance and otherwise, and he had within one year from the date of said application been consulted by a physician at divers and sundry times for divers and sundry diseases, and he was not then nor had he been at any time within twelve months preceding the date of said application free from diseases, ailments, weaknesses or infirmities; that he was then and long had been suffering from and subject to and predisposed to cough, expectoration, difficulty of breathing and palpitation, and was then and long had been suffering from divers and sundry serious, dangerous and incurable diseases and illnesses, local diseases, injuries,
mental and nervous diseases and infirmities and diseases,
18 weaknesses and ailments of the head, throat, lungs, heart, stomach, intestines, liver, kidneys, bladder, and divers and

sundry other diseases, weaknesses and infirmities, and he and divers and sundry of his brothers were then and long had been afflicted with anaemia, consumption, hemmorrhages, gout, cancer and pulmonary complaints; and each and every of the aforesaid was material to the risk of insuring the life of said Roloson.

And further answering, defendant realleges the foregoing, and further states and shows to the court that, to-wit, on the 19th day of November, 1901, for the purpose of inducing this defendant to issue a policy of insurance upon his life, said Eber B. Roloson did represent to it that he was then and had been for the twelve months then past in good health and free from all ailments, diseases, weaknesses and infirmities; that he had never had pneumonia, spitting or raising of blood, or other hemorrhages, and was not then, and never had been subject or predisposed to cough, expectoration, difficulty of breathing or palpitation, and did not have and never had any ailments, local diseases, injuries or infirmities, and did not have and never had had any diseases, weaknesses or ailments of the head, throat, lungs, heart, stomach, intestines, liver, kidneys, bladder, or any disease or infirmity whatsoever; that no company or association had ever postponed or declined to grant insurance on his life; that none of his brothers, parents, uncles, sisters or aunts were or ever had been afflicted with anæmia, consumption, cancer, gout, rheumatism or any pulmonary complaint; wher-as the facts were as aforestated, and he then was and long had been suffering from divers and sundry diseases, ailments, and weaknesses of the stomach, heart, head, lungs, and blood, and was then and there and during all of the times herein mentioned afflicted with and suffering from consumption, anæmia and had had pneumonia and spitting of blood and hemorrhages, and was and long had been subject
19 and predisposed to cough, expectoration, difficulty of breathing and palpitation and divers and sundry other illnesses, weaknesses and diseases, and said Roloson had been previously rejected by sundry other companies and associations to which he had applied for medical examination, and divers and sundry of his brothers, parents, uncles and aunts were then and long had been afflicted with consumption, rheumatism and pulmonary complaints; and said Roloson at all times knew all the facts aforesaid, and did falsely and fraudulently conceal the same from defendant, and did do as aforesaid for the purpose of inducing defendant to issue a policy of insurance upon his life. That one L. E. Lee was at that time medical examiner of and for defendant in the village of Weatherby, Missouri, which fact was well known to said Roloson; and said Roloson and said Lee then and there did conspire and agree together to conceal the facts aforesaid from defendant and to have a favorable medical report of the physical condition and insurability of said Roloson made to defendant by said Lee for the purpose of inducing defendant to accept such application; and to that end said Lee, pretending to act as medical examiner for defendant and on its behalf, and acting in collusion with said Roloson and attempting to conceal, and concealing the truth and facts concerning the matters aforesaid, did make a pretended medical examination of

said Roloson for defendant, and instead of reporting the facts aforesaid, did represent at the request of said Roloson to this defendant that said Roloson was then in perfect health and safely insurable, and in the capacity of medical examiner did advise that said application be accepted and that a policy be issued, whereas said Lee well knew at that time all the facts aforementioned. That said application and medical examination were made by said Lee and said Roloson, and by said Roloson caused to be forwarded to defendant at the City of Minneapolis, Minnesota, for the purpose and with the purpose on his part to conceal the truth from defendant and to deceive and mislead it into accepting such application and
20 issuing a policy thereon, and he knew defendant, if it knew any of the truths aforesaid, would not issue any policy on his life, and defendant there received the same, to wit, in the month of November, 1901, and defendant believed each of the statements, warranties, and representations of said Lee and said Roloson to be full, true and complete, and in reliance thereon and on each of them and on the said agreements, and in consideration thereof and in ignorance of the truth, did on the 21st day of November, 1901, issue and deliver its policy of insurance in the sum of $5,000.00 on on the life of said Roloson; that it would not have accepted said application or issued said policy but for the warranties, statements and representations, agreements and acts aforementioned, and each of the-, or if it had known any of the true facts aforementioned; all whereof was to said Roloson known.

Further answering, defendant alleges that the death of said Roloson was caused by the diseases, ailments, weaknesses, disorders and imperfections in his physical condition which are hereinbefore stated and which he had and which existed and to which he was subject at the time of making the application aforementioned. That defendant did not know and never had any means of knowing any of the facts and matters aforementioned until after the death of said Roloson and the appointment of plaintiffs as executors, and as soon as it learned any of the facts aforesaid it did tender back to plaintiffs the full amount of all premiums paid on the policy aforesaid, with interest, which amount plaintiffs did then and there refuse to accept, and defendant now brings into court and tenders the sum of Two hundred and twenty-five dollars and — cents, which is the full amount of all premiums paid upon said policy with interest aforesaid.

And for a further defense herein defendant re-alleges the foregoing, and states that in and by the policy and application
21 aforementioned and each of them, it was provided, stipulated and agreed by and between defendant and said Roloson that said policy should not be binding upon defendant unless it were issued to and delivered to and accepted by said Roloson if and while he was in good health, and that said policy should be null and void unless each and every of the statements, warranties and representations aforementioned was absolutely full, true and complete; and in and by said policy it was stipulated and provided that the application aforementioned and the warranties therein contained

were a consideration for the issuance of said policy and that each of them was true; that such consideration has entirely failed, whereby there has been lost to defendant a substantial consideration for the issuing of said policy.

Defendant further states that said policy was never delivered to insured while in good health and never was accepted by him in good health and never was in force or effect, because of the facts and matters aforesaid.

And for its answer to the second count in said complaint contained, defendant denies each and every allegation, matter and thing thereof, except as hereinafter admitted or to the contrary alleged.

Admits the death and residence of said Roloson, the making and probating his will and the appointment and qualification of plaintiffs, and the corporate capacity and business of defendant as alleged.

That, to-wit, on May 14, 1902, defendant issued a certain policy of insurance, whereby it insured the life of said Roloson in the sum of $5,000, which policy bears said date and is by plaintiffs filed in this action. That defendant has never paid and has refused to pay anything on account of said policy.

And defendant alleges that the facts in connection with
22 the issuance of said policy in said second count referred to are as hereinafter stated, and not otherwise.

And defendant re-alleges all hereinbefore stated, and alleged by it in its answer to the first count of plaintiff's complaint. And further alleges that pursuant to the fact and conspiracy and design therein mentioned, said Rolosen did, to-wit, on the 10th day of May, 1902, make to defendant his certain application in writing for insurance, wherein and whereby he did make to this defendant the same warranties and agreements as in his first application made, and towit, on May 10th, 1902, did make to defendant the same representations as made in connection with the said first policy and application therefor; and he and said Lee did do in connection therewith as before related they did in connection with said first policy; and they and each of them during all the said times knew all of the facts in this answer stated, and they did as aforesaid for the purpose of concealing from defendant the truth and the facts concerning said Roloson and his physical condition and the condition of his family and relatives, and for the purpose and with the purpose and intent of concealing the truth from defendant and of deceiving and misleading it into accepting said application and issuing a policy of insurance upon the life of said Roloson, and they and each of them knew that defendant would not insure the life of said Roloson if it knew any of the facts aforesaid; and said Roloson did cause said application to be forwarded to said defendant at Minneapolis, Minnesota, where its home office then was, and to wit, about the date aforementioned, and defendant there received the same and believed the warranties, agreements, statements and representations of said Lee and said Roloson to be full, true and complete, and in reliance thereon and on each of them, and on said agreements, and in con-

sideration thereof and in ignorance of the truth, or any
23 thereof, defendant did, to-wit, on the 14th day of May, 1902, issue and deliver its said policy of insurance on the life of said Roloson in the sum of $5,000. That it would not have accepted said application or issued said policy but for the statements, warranties, agreements and representations and acts aforementioned, and each of them, or if it had known any of the true facts aforementioned, all whereof was at all times known to said Roloson.

And defendant alleges that the death of said Roloson was caused by the diseases, ailments, weaknesses, disorders and imperfections in his physical condition which are hereinbefore stated and which he had and which existed and to which he was subject during all of the times herein mentioned. That defendant did not know and never had any means of knowing any of the facts and matters aforesaid and until after the death of said Roloson and the appointment of said plaintiffs as executors, and as soon as it learned any of the facts aforementioned it did tender back to plaintiffs the full amount of all premiums paid on the policy aforesaid, with interest, which amount plaintiffs did then and there refuse to accept, and defendant now brings into court and tenders the sum of One hundred and forty dollars and — cents, which is the full amount of all premiums paid on said policy with interest aforesaid.

And for a further defense defendant realleges the foregoing, and states that in any by the policy and application aforementioned it was stipulated, provided and agreed that the said application and the warranties and agreements therein contained were a consideration for the issuance of said policy, and each of them was true. That because of the facts aforementioned the consideration for the issuance of said policy has failed.

And defendant alleges that in and by said application and
24 policy it was stipulated, provided and agreed that said policy should not become in force or effect, nor should defendant incur any liability thereunder, unless and until said policy were delivered to and accepted by said Roloson while he was in good health. That said policy never was delivered to said Roloson while in good health, and never was accepted by him while in good health, and never became in force or effect.

Wherefore, defendant prays that plaintiff take nothing by this action, and that it have and recover its costs and disbursements herein.

Dated March 2, 1905.

W. A. KERR AND
S. S. BROWN AND
J. A. DOLMAN,
Solicitors for Defendant, 708 *Andrus Bldg.*,
Minneapolis, Minn. and St. Joe, Mo.

And afterwards, to-wit, on the *on the* 7th day of March, and on the second day of said March Term, the following appears of record:

No. 318.

PAUL RIGGS ET AL.
vs.
NORTHWESTERN NATIONAL INSURANCE COMPANY.

Come now the plaintiffs herein and file motion to strike out parts of defendant's answer heretofore filed herein.

Which said motion to strike out is in words and figures as follows:

25 In the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division.

PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eber B. Roloson, Deceased, Plaintiffs,
vs.
THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

Motion to Strike Out.

Come now the plaintiffs by their attorneys and move the court to strike out part of the answer of the defendant as follows: Beginning in the 6th paragraph of said answer with the words "and was insolvent" and embracing the following words "and was insolvent so that his entire possessions and assets and property of every kind and description were not at any time sufficient to pay his indebtedness then existing." Also beginning with the word "that" at the beginning of the succeeding paragraph and including all of said paragraph as follows: "That all of the aforesaid was at all times well known to said Roloson, and he, knowing all the facts aforesaid, and that he was about to die, did prior to the making of either of the applications hereinafter mentioned, form the design fraudulently and wrongfully by covin and misrepresentation, fraud and concealment to induce this defendant and divers other insurance companies to insure his life for large sums of money, and to borrow the money wherewith to pay out premiums thereon, and to conspire and agree with divers and sundry other people who were each
26 then and there cognizant of the facts aforesaid that he and they should do as aforesaid, and that they should assist him in so doing and to furnish the money to pay the premiums on his life insurance." Also in the next succeeding paragraph beginning with the words "to induce" and embracing that part of said paragraph as follows "To induce defendant to accept said application and issue said policy, said Roloson did warrant to defendant that each and every of the statements and answers made in said application was full, true and complete and that no company or association had ever postponed or declined to grant insurance on his life; that no

physician had ever given an unfavorable opinion upon his health with reference to life insurance or otherwise; that he had not been consulted or attended by any physician within one year prior to the date of said application; that the only disease or ailment for which he had consulted a physician within ten years had been a bilious attack." Also in the same paragraph the following words, "that none of his parents, brothers or sisters, uncles or aunts had ever been afflicted with consumption, cancer, gout, rheumatism, or any pulmonary complaint, except one sister, and in and by said application he did further warrant and agree that each and every of said statements and warranties therein contained were material to the risk of insuring his life; that each and every of said warranties and statements was full, true and complete." Also in the same paragraph the following words "and that if any of the answers, statements or warranties contained in said application were not full, true and complete or if any of them was in any respect untrue, then any policy thereon should be null and void, any statute or law to the contrary notwithstanding; and therein and thereby said Roloson did undertake and agree that no obligation should arise under said application until a policy of insurance should be issued and delivered to him while and if he was in good health.

27 That each and every of the statements and warranties aforementioned was untrue; that in fact divers and sundry companies and associations had postponed and declined to grant insurance on his life, and divers and sundry physicians had given an unfavorable opinion on his health with reference to life insurance and otherwise, and he had within one year from date of said application been consulted by a physician at divers and sundry times for divers and sundry diseases, and he was not then nor had he been at any time within twelve months preceding the date of said application free from diseases, ailments, weaknesses or infirmities; that he was then and long had been suffering from and subject to and predisposed to cough, expectoration, difficulty of breathing and palpitation, and was then and long had been suffering from divers and sundry serious, dangerous and incurable diseases and illnesses, local diseases, injuries, mental and nervous diseases and infirmities and diseases, weaknesses and ailments of the head, throat, lungs, heart, stomach, intestines, liver, kidneys, bladder, and he and divers and sundry of his brothers were then and long had been afflicted with anæmia, consumption, hemmor-hages, gout, cancer, and pulmonary complaints; and each and every of the aforesaid was material to the risk of insuring the life of said Roloson.

And further answering, defendant re-alleges the for-going and further states and shows to the court that to-wit on the 19th day of November, 1901, for the purpose of inducing this defendant to issue a policy of insurance upon his life, said Eber B. Roloson did represent to it that he was then and had been for the twelve months then past in good health and free from all ailments, diseases, weaknesses and infirmities; that he had never had pneumonia, spitting or raising of blood, or other hemorrhages, and was then and never had been subject or predisposed to cough, expectoration, difficulty

of breathing, or palpitation, and did not have and never had
28 had any ailments, local diseases, injuries or infirmities, and did not have and never had had any diseases, weaknesses or ailments of the head, throat, lungs, heart, stomach, intestines, liver, kidneys, bladder, or any disease or infirmity whatsoever; that no company or association had ever postponed or declined to grant insurance on his life; that none of his brothers, parents, uncles, sisters, or aunts were or ever had been afflicted with anæmia, consumption, cancer, gout, rheumatism or any pulmonary complaint." Also in said paragraph the following words, "and said Roloson had been previously rejected by sundry other companies and associations to which he had applied for medical examination, and divers and sundry of his brothers, parents, uncles and aunts were then and long had been afflicted with consumption, rheumatism and pulmonary complaints; and said Roloson at all times knew all the facts aforesaid, and did falsely and fraudulently conceal the same from defendant, and did do as aforesaid for the purpose of inducing defendant to issue a policy of insurance on his life. That one L. E. Lee was at that time medical examiner of and for defendant in the village of Weatherby, Missouri, which fact was well known to said Roloson; and said Roloson and said Lee then and there did conspire and agree together to conceal the facts aforesaid from defendant and to have a favorable medical report of the physical condition and insurability of said Roloson made to defendant by said Lee for the purpose of inducing defendant to accept such application; and to that end said Lee, pretending to act as medical examiner for defendant and on its behalf, and acting in collusion with said Roloson and attempting to conceal and concealing the truth and the facts concerning the matters aforesaid, did make a pretended medical examination of said Roloson for defendant, and instead of reporting the facts aforesaid, did represent at the request of said Roloson to this defendant that said Roloson was then in perfect health and safely insurable, and in the capacity of medical examiner did
29 advise that said application be accepted and that a policy be issued, whereas said Lee knew well at that time all the facts aforementioned: That said application and medical examination were made by said Lee and said Roloson, and by said Roloson, caused to be forwarded to defendant at the City of Minneapolis, Minnesota, for the purpose and with the purpose on his part to conceal the truth from the defendant and to deceive and mislead it into accepting such application and issuing a policy thereon, and he knew defendant, if it knew any of the truths aforesaid, would not issue any policy on his life, and defendant there received the same, to wit, in the month of November, 1901, and defendant believed each of the statements, warranties and representations of said Lee and said Roloson to be full, true and complete, and in reliance thereon and on each of them and on the said agreements, and in consideration thereof and in ignorance of the truth, did on the 21st day of November, 1901, issue and deliver its policy of insurance in the sum of $5,000 on the life of said Roloson; that it would not have accepted said application or issued said policy but for the war-

ranties, statements and representations, agreements and acts aforementioned, and each of them, or if it had known any of the true facts aforementioned; all whereof was to said Roloson known." Also in the next succeeding paragraph the following words "That defendant did not know and never had any means of knowing any of the facts and matters aforementioned until after the death of said Roloson and the appointment of plaintiffs as executors." Also all of the next two succeeding paragraphs as follows: "And for a further defense herein defendant realleges the foregoing, and states that in and by the policy and application aforementioned, and each of them, it was provided, stipulated and agreed by and between defendant and said Roloson that said policy should not be binding upon the defendant unless it were issued to and delivered to and accepted by said Roloson if and while he was in good health,
30 and that said policy should be null and void unless each and every of the statements, warranties and representations aforementioned were absolutely full, true and complete; and in and by said policy it was stipulated and provided that the application aforementioned and the warranties therein contained were a consideration for the issuance of said policy and each of them was true; that such consideration has entirely failed, whereby there has been lost to defendant a substantial consideration for the issuing of said policy.

Defendant further states that said policy was never delivered to insured while in good health and never was accepted by him in good health and never was in force or effect, because of the facts and matters aforesaid."

Also in the fifth paragraph of the second count of said answer the following words "that pursuant to the fact and conspiracy and design therein mentioned." Also all of the 7th and 8th paragraph of the second count of said answer as follows: "And for a further defense defendant realleges the foregoing, and states that in and by the policy and application aforementioned it was stipulated, provided and agreed that the said application and the warranties and agreements therein contained were a consideration for the issuances of said policy and that each of them was true. That because of the fact aforementioned the consideration for the insurance of said policy has failed.

And defendant alleges that in and by said application and policy it was stipulated, provided and agreed that said policy should not become in force or effect, nor should defendant incur any liability thereunder, unless and until said policy were delivered to and accepted by said Roloson while he was in good health. That said policy was never delivered to said Roloson while in good health, and was never accepted by him while in good health, and never became in force or effect."

As grounds for said motion the plaintiffs say that the parts
31 of said answer asked to be stricken out and none of them state any defence whatever to the plaintiff's cause of action; that said parts of said answer undertake to make a defence which is excluded and prohibited by the contract of said insurance company with the State of Missouri and with the assured, and is an attempt to evade the provisions of Section 7890 of the Revised Statutes of Missouri, 1899, which said section is as follows: "Misrepresentation,—

No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this State shall be deemed material or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury."

Because the parts of said answer asked to be stricken out and none of them show that any of the matters alleged therein to have been misrepresented by the assured or in any manner contributed to the death of said Eber B. Roloson, the plaintiffs therefore pray the court to strike out said parts of said answer.

W. H. HAYNES,
K. B. RANDOLPH &
HEWITT & FITCH,
Attorneys for Plaintiffs.

32 And afterwards, to-wit, on the 8th day of March and the third day of said March Term, the following proceedings were had and entered of record:

PAUL RIGGS ET AL.
vs.
NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY.

Now here the motion to strike out parts of the defendant's answer heretofore filed herein, is taken up, argued and submitted to the Court and by the Court overruled; and the plaintiffs herein electing to go to trial in this cause, a jury is called to-it; James Townsend, D. A. Hardin, George L. Carter, C. E. Van Meter, Thomas Winn, R. H. Nicholson, George W. Smith, T. S. Brower, G. W. Ballingee, George De Beaumont, John M. Carter and Nathan D. Goff, twelve good and lawful men, residents of the St. Joseph Division of the Western District of Missouri, who were duly challenged, empaneled and sworn to well and truly try the issues joined herein, enter upon the discharge of their duties; and afetr hearing evidence, and some progress having been made in the trial of this cause, the jury is dismissed until tomorrow morning under the usual charge, not to converse about the case.

And now here the plaintiffs file reply to defendant's answer heretofore filed herein.

Which said Reply to defendant's answer, is in words and figures as *as* follows:

PAUL RIGGS ET AL., Plaintiffs,
vs.
THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY,
Defendant.

Reply.

Come now the plaintiffs and for reply to the first count of the answer of the defendant, deny each and every allegation of new matter contained therein.

And for further reply the plaintiffs say that the examining physician mentioned in the said count of said answer was the agent of the defendant and that the defendant is thereby estopped to claim
33 that any other or different facts existed than such as are shown by the report of the said medical examiner upon the application of said Roloson for the policy of insurance mentioned in the said first count of said answer.

Second Count.

For reply to the second count of the defendant's answer plaintiffs deny each and every allegation of new matter in said count of said answer contained.

And for further reply the plaintiffs say that the examining physician mentioned in the said count of said answer was the agent of the defendant and that the defendant is thereby estopped to claim that any other or different facts existed than such as are shown by the report of the said medical examiner upon the application of said Roloson for the policy of insurance mentioned in the said second count of said answer.

R. A. HEWITT,
W. M. FITCH,
W. H. HAYNES,
K. B. RANDOLPH,
Attorneys for Plaintiffs.

And afterwards to-wit, on the 9th day of March, A. D. 1905, and on the fourth day of said March Term, the following further proceedings were had and entered of record:

No. 318.

PAUL RIGGS ET AL.
vs.
NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY.

Come now the parties to this suit by their respective attorneys, and also come the jurors heretofore sworn and empaneled to try this cause, when further evidence is heard, and some progress having been made, the jurors are allowed to disperce until tomorrow morning, at 10 o'clock, under the former admonition not to converse about the case.

And afterwards to-wit, on the 10th day of March, A. D. 1905, and on the fifth day of said March Term the following further proceedings were had and entered of record:

No. 318.

PAUL RIGGS ET AL.
vs.
NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY.

34 Come now the parties to this suit by their respective attorneys, and also come the jurors heretofore sworn and empaneled to try this cause, when further evidence is heard and some progress is made, when the jurors are permitted to disperse until tomorrow morning at 10 o'clock, under the admonition of the Court not to converse about this case.

And afterwards, to-wit, on the 11th day of March, 1905, and the 6th day of said March Term the following further proceedings were had and entered of record:

No. 318.

PAUL RIGGS ET AL.
vs.
NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY.

Come now again the parties to this suit by their respective attorneys, and also come the jurors heretofore sworn and empaneled to try this cause, when further evidence is heard and some progress is made, when the jurors are permitted to disperse until Monday, March 13th, 1905, at the hour of 11 o'clock A. M., under the admonition of the Court "not to converse with any one about the case."

And afterwards, to-wit, on the 13th day of March, 1905, and on the 7th day of said March Term the following further proceedings were had and entered of record:

No. 318.

PAUL RIGGS ET AL.
vs.
NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY.

Come now the parties to this suit by their respective attorneys, and also come the jurors sworn and empaneled to try this cause, when further evidence is heard and some progress was made, when the jurors are permitted to disperse until tomorrow morning under the admonition, "not to converse about the case."

And afterwards, to-wit, on the 14th day of March, 1905, and on the 8th day of said March Term the following further proceedings were had and entered of record:

35

No. 318.

PAUL RIGGS ET AL.
vs.
NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY.

Come now the parties to this suit by their respective attorneys, and also come the jurors heretofore sworn and empaneled to try this cause, when further evidence is heard and cause was arged by counsel, and some progress was made when the jurors are permitted to disperse until tomorrow morning, under the admonition of the Court "not to converse about the case."

And afterwards, to-wit, on the 15th day of March, 1905, and on the 9th day of the said March Term, the following further proceedings were had and entered of record:

No. 318.

PAUL RIGGS ET AL.
vs.
NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY.

Come now the parties to this suit by their respective attorneys, and also come the jurors heretofore empaneled and sworn to try this cause, when instructions are given by the Court, and the jurors retire to consider of their verdict. And now here come the jurors aforesaid and return into open Court the following verdict to-wit: "We the jury find for the plaintiffs and assess their damages at $11,050.00. N. D. Goff, Foreman."

It is therefore considered, ordered and adjudged by the Court, that the plaintiffs have and recover of and from the defendant the sum of eleven thousand and fifty dollars ($11,050.00) the amount aforesaid assessed by the jury, together with the costs of suit and that they have execution therefor.

Leave is hereby granted defendant, in open court, to file motion for a new trial; and defendant is allowed 42 days in which to file Bill of Exceptions and Bond for appeal to the United States Circuit Court of Appeals for the 8th Judicial Circuit, and execution is stayed during said 42 days.

36–38 And afterwards, to-wit, on the 26th day of April, A. D. 1905, the defendant filed in the office of the Clerk of Circuit Court for the St. Joseph Division of the Western District of Missouri, its Bill of Exceptions, which said Bill of Exceptions is in words and figures following:

OF RATES

ND DOLLARS OF INSURANCE.

olicy and made an integral part thereof.

end of expectancy, thereafter at such age.

SEMI-ANNUAL	QUARTERLY	Expectation of Life. Years	Age.	ANNUAL	SEMI-ANNUAL	QUARTERLY	Expectation of Life. Years
6.60	$3.37	28 72	56	$29.65	$15.42	$ 7.88	16.22
6.76	3.44	28.00	57	31.64	16.45	8.38	15.59
6.90	3.51	27.28	58	33.83	17.59	8.96	14.97
7.07	3.60	26.56	59	36.21	18.82	9.59	14.37
7.25	3.69	25.84	60	38.89	20.22	10.31	13.77
7.50	3.82	25.12	61	41.81	21.73	11.07	13.18
7.80	3.99	24.40	62	45.03	23.42	11.93	12.61
8.14	4.04	23.69	63	48.51	25.22	12.86	12.05
8.56	4.36	22.97	64	52.35	27.22	13.87	11.51
9.00	4.58	22.27	65	56.52	29.39	14.98	10.97
9.50	4.84	21.56	66	61.04	31.74	16.17	10.46
10.04	5.11	20.87	67	65.98	34.30	17.49	9.96
10.62	5.42	20.18	68	71.32	37.08	18.80	9.47
11.27	5.74	19.50	69	77.04	40.06	20.41	9.00
11.96	6.09	18.82	70	83.25	43.29	22.05	8.54
12.73	6.48	18.16	71	89.95	46.77	33.84	8.09
13.54	6.90	17.50	72	97.18	50.53	25.74	7.57
14.43	7.35	16.86	73	104.97	54.57	27.81	7.11
			74	113.43	58.97	30.05	6.68

FOLD OUT IS TOO LARGE TO BE FILMED

Life Protective

THE

POLICY

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Life Protec

No. 53

Insurance

Amount $5000.00

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Dated Nov

J. A. Na

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ASSIGNMENT.

For value received ..... *hereby transfer and assign unto* ..... *executors, administrators and assigns, all right, title and interest in this Policy of Insurance, and to the payment made therefor, and all the benefits and advantages to be derived therefrom.*

WITNESS ..... *hand and seal, at* ..... *this* ..... *day of* ..... *190*....

Signed and delivered in presence of ..... } ..... *(SEAL)* INSURED.

I consent to the above.

..... *(SEAL)* BENEFICIARY.

Approved this ..... *day of* ..... *190*....

..... *Secretary.*

Also policy #61701 in words and figures following:

FOLD OUT IS TOO LARGE TO BE FILMED

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Premium

$130 20

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No.

14th 1902

Scott

Agent

NFORM THE HOME OFFICE

T OFFICE ADDRESS.

Inviting Home Office

$ ..... A. D. .....

Received of the

Northwestern National Life Insurance Company,

..... **Dollars,**

in full of all claims under this Policy No. ..... on the

life of ..... deceased.

Witness. ..... **Beneficiary.**

..... **Beneficiary.**

Life Protecti

No. 617

THE

Insurance

Amount $5000.00

Payable Au

Issue

Eber B.

of

Kentucky

Dated May

S. A. Wa

MEMBERS MUST PROMPTLY

OF ANY CHANGE IN POS

Always give number of Policy

ASSIGNMENT.

For value received ..... *hereby transfer and assign unto* .....

..... *executors, administrators and assigns, all right, title and interest in this Policy of Insurance, and to the payment made therefor, and all the benefits and advantages to be derived therefrom.*

WITNESS ..... *hand and seal, at* ..... *this* ..... *day*

of ..... *190*...

Signed and delivered in presence of

..... } ..... *(SEAL)*

I consent to the above. INSURED.

..... *(SEAL)*

BENEFICIARY.

Approved this ..... *day of* ..... *190*...

..... *Secretary.*

39 In the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division.

PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eber B. Roloson, Late of De Kalb County, Missouri, Deceased, Plaintiffs,

vs.

THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

Bill of Exceptions.

On the 8th day of March, 1905, and at the March term of said court this cause came on to be heard before a jury therein duly empaneled and sworn.

Counsel: For plaintiffs, Messrs. Randolph, Haynes, Hewitt and Fitch. For defendant, Messrs. Kerr, Brown and Dolman, and Hubbard.

And thereupon the plaintiffs to sustain the issues on their part offered and introduced in evidence policy #53966 purporting to be issued by defendant upon the life of Eber B. Roloson, which said policy is in words and figures following:

(Here follow policies marked pages 40 and 41.)

42 It was admitted by the parties that Eber B. Roloson died February 28th, 1903, at Weatherby, De Kalb Co. Mo. and that then he was and had been for a number of years before said policies were issued a citizen of said County and State and that all premiums then accrued on said policies had ben paid and that proofs of death were made in which it was stated that he died of progressive anæmia, and plaintiffs rested. The defendant to sustain the issues on its part offered in evidence the deposition of W. F. Bechtel, which is in words and figures following:

Interrogatory 1. State your name, age, and place of residence.

Answer to interrogatory 1. W. F. Bechtel, age 49, Residence Minneapolis, Minn.

Interrogatory 2. Are you or have you at any time been connected with the defendant Insurance Company in any official capacity? If so, state when and in what capacity.

Answer to interrogatory 2. I am, and have been since the first of February, 1901, the President of the defendant Northwestern National Life Insurance Company.

Interrogatory 3. Did Eber B. Roloson, late of De Kalb County, Missouri, now deceased, have a policy of life insurance in said company? If so, state its number, date, and amount, and if it is the same policy sued on in this case.

Answer to interrogatory 3. Yes. Eber B. Roloson, late of De Kalb County, Missouri had two policies of insurance in said company. The first policy was No. 53966, and was dated Nov. 21, 1901, and was in the sum of $5000. upon the life of said Roloson; the second policy was No. 61701, dated May 14, 1902, and was in the same sum, upon the same life. They are the two policies sued upon in this case.

Interrogatory 4. State whether or not Mr. Eber B. Roloson made application in writing for this insurance, and if so, whether or
43 not such application was accompanied by or contained any examination by or report of a physician with rsepect to his health or family history. If you answer in the affirmative please identify and cause to be attached to your deposition copies of such writings.

Answer to interrogatory 4. Roloson made separate applications for said policies, and said applications were acompanied by and contained a medical examination. Hereto attached and marked Exhibit "A" are copies of the applications and medical examinations and reports for the first policy. Hereto attached and marked Exhibit "B" are the application, medical examination and examiner's report for the second policy.

Interrogatory 5. State to what extent, if any, the making of such application and such medical or physician's examination was a condition to the issuing of said policy by the defendant company.

Answer to interrogatory 5. The company has never, since I have been connected with it, issued policies, except upon such applications and examinations and reports. The making of them is, and always has been a condition precedent to the issuing of the policy. They are all necessary to enable the insurer to determine whether

or not it wants to insure the life of the applicant. And unless the application, medical examination and report show the applicant in good health and insurable condition, and free from diseases and a good risk, the policy is never issued. And we would not at any time have issued a policy except upon a good risk, and on one whose application and medical examination and report showed to be a good risk and in good health, and free from disease.

Interrogatory 6. State to what extent the statements contained in said application and examination influenced the defendant in issuing said policy with reference particularly to the statements and answers involved in the issues of this suit.

Plaintiffs object to the interrogatories and answers five & six as calling for incompetent and irrelevant testimony and as an attempt to evade the statutes of Missouri, governing the effect of the application for insurance. Objection sustained as to last three sentences of answer to interrogatory six. Defendant excepted.

44 Answer to interrogatory 6. The statements contained in the application and the warranties and agreements therein contained were the basis of and the consideration for the issuance of the policy. But for them and each of them each policy would not in either case have been issued. When the application came in, the defendant believed the statements, warranties and representations therein contained, and each of them, to be true and issued the policy in each case in consideration thereof, and in reliance thereon, and because thereof, and because it believed them to be true, and would not otherwise have accepted the application or issued the policy. The policy would never have been issued if the application had shown, or if we had known, that the insured was suffering from any disease or ailment, or was not in perfect physical condition. This is true in each case. We also depend upon the medical examination in this way,—if the application proper shows the insured free from any disease and a good risk we then consider the report of the medical examiner and the medical examination, and see whether it corroborates the application. If the application shows the applicant to be non-insurable, or suffering from any disease or ailment, or with a bad family history, the application is rejected at once, without reference to a medical examination, but when the application shows a good risk upon its face, we consider the medical examination and report. We did in each of these cases, and would not in either case have taken the application alone, had it not been accompanied by a medical examination and examiner's report. If we had known any of the facts in this case, as they are set forth in our pleadings, or as they were set forth in the action to cancel the policies in equity, we would not have accepted either application. We would never have accepted an application which showed the applicant to have a bad family history, or to be in poor health, or to have or be suffering from diseases of the lungs, heart or stomach, or pulmonary trouble, anæmia or hemorrhages, or any physical ailment, weakness or disorder. This would be so whatever the medical examination might be, nor would we have accepted the application if the

application had, upon its face shown the application to be a
45 good risk, if the medical examination or *or* report showed him to be a poor risk or to have any of these troubles or any disease, sickness, weakness or ailment, or to have had such. This is and always has been true of both applications and policies. We relied, too, upon the other conditions and agreements of the applicant, including the agreement that the policy should not become effective until delivered to him and accepted by him while in good health. I did not know, nor did the defendant know that any of the breaches of warranty or misrepresentation, or concealment, in connection with either of these policies, or that Roloson had a bad family history, or that there was any misrepresentation, fraud or concealment, either in the application or the medical examination or report, or that he was not at all times a perfect risk and in perfect health, until after his death and the appointment of his executors. As soon as we had learned anything of this, we tendered back all premiums paid with interest. The premiums paid on the first named policy were the sum of $203.70, and on the second policy the sum of $130.20. Premium payments on the first policy were $130.20, 11/2/01; $36.75, 11/24/02; $36.75, 2/16/03, total $203.70. On the second policy, the total payment was $130.20, paid 5/14/02.

The defendant offered and introduced in evidence the original applications of Eber B. Roloson for the policies sued on, each of which applications consisted of parts 1 and 2, and correspond in words and figures with the copies thereof set forth upon said policies respectively.

Defendant then offered the deposition of J. W. BAKER, taken on behalf of defendant, which is in words and figures following:

Direct examination by Mr. BROWN, of the law firm of Brown & Dolman, of St. Joseph, Missouri:

46 Q. State your full name, Doctor?
A. Dr. J. W. Baker.
Q. Where do you live, Doctor?
A. I live at Enid, Oklahoma Territory.
Q. What is your profession, Doctor?
A. I am a physician and surgeon.
Q. How long have you been a practising physician and surgeon?
A. Since February 20, 1893.
Q. Have you been in active practise since that time?
A. Yes, sir, I have.
Q. How long have you lived in the City of Enid, Oklahoma?
A. I have lived herein in Enid, Oklahoma, for four and one-half years (4½) years.
Q. Where did you live last previous to that time?
A. I lived at Weatherby, Missouri, before coming here.
Q. How long did you live in Weatherby, Missouri?
A. About seven (7) years.

Q. Did you begin the practise of your profession in Weatherby, Missouri?
A. Yes, sir; I began there.
Q. Are you acquainted, or were you acquainted with Mr. Eber B. Roloson, in his life time?
A. Yes, sir, I was acquainted with Mr. Eber B. Roloson.
Q. And where did Mr. Roloson live?
A. He lived at Weatherby, Missouri.
Q. How long did he reside at Weatherby, Missouri, while you were there?
A. I think about two (2) years.
Q. Where did he reside before that time?
A. He lived north of Weatherby about fourteen (14) miles, something of that kind.
Q. Did you know him at all, when he lived north of Weatherby?
A. Yes, sir, I knew him.
Q. Did you ever treat Mr. Eber B. Roloson?
A. Yes sir, I have treated him.
47 Q. State when you treated him, Doctor?
A. I gave him the first prescription, by referring to my memoranda book, on November 20, 1899.
Q. You say that was on November 20, 1899?
A. Yes, sir; that was the date.
Q. Did you treat him for any length of time, continuously?
A. Well, yes, he was at my office every day; but, not for treatment every day; that was one of his stopping places.
Q. How frequently did you treat him, and during what period of time did you so treat hm?
A. He was under my treatment from the 20th of November, and the last prescription that I gave him was on April 19, 1900.
Q. What disease did you treat him for during that time?
A. I prescribed first for gastritis; along in the winter, he had a little attack of bronchitis, of possibly a week's duration.
Q. And after that?
Q. For general nervousness, along with the other.
Q. After that, up until April, what was the matter? Did his bronchitis last him all that time?
A. No sir; his stomach troubled him.
Q. To what extent did he have stomach trouble during that time?
A. That takes in quite a scope.
Q. What takes in quite a scope?
A. The extent of the stomach trouble.
Q. Just state the extent of the stomach trouble?
A. Well, it prevented digestion of food; food fermented, producing gas, and he had sympathetic nervous trouble, reflex trouble; the assimilation was not perfect.
Q. In what condition was he when you last treated him in the month of April, 1900?
A. About the same condition as when I began with him.
Q. Was the trouble chronic, doctor?

48 By W. H. HAYNES, attorney for the plaintiff: That question is objected to, for the reason that it is leading.

Q. State whether or not it was acute or chronic?
A. I would call it sub-acute.
Q. What does that mean, Doctor?
A. After having had the attack, the chronic form, as I understand it, is one of continuous progress; an acute attack is something that we have and recover in a short time; sub-acute would be renewed attacks.
Q. Did he give you any history of the trouble?
A. That he had had repeated attacks before.
Q. In your opinion, doctor, what was the cause of the difficulty?
A. You mean as to what was the cause of the stomach trouble?
A. Yes, sir; in your opinion, what was the cause of the trouble?
A. It can be caused from errors in digestion, from a depraved condition of the system; and from diseases of other organs.
Q. My question was, what was the cause in your opinion in that case? Not what it could have been?
A. Well, general nervousness.
Q. State your reasons for so diagnosing it?
A. Well, in talking, walking and in action; he was suffering from a mental strain, which would cause nervousness.
Q. A mental strain of what kind?
A. His wife was sick, and afterwards died.
Q. What was the matter with his wife?
A. Tuberculosis.
Q. Was it, was it what is called pulmonary tuberculosis?
A. Yes sir.
Q. And did you treat her for this trouble?
A. Yes, sir; I treated her.
Q. That is the disease that is commonly called, or known as consumption, is it?

49 A. Yes sir.
Q. How long did you treat her?
A. About a year, possibly, or little longer; possibly not quite so long. I would not be definite as to the time. I could give you the exact time, if necessary.
Q. At what time did she die?
A. I looked for that at noon, and did not find it; I don't know just exactly the day of her death.
Q. According to your best recollecton, was it in 1899 or 1900?
A. My recollection is, that it was in 1900; I am not positive as to that, however.
Q. In what part of the year was it?
A. It was in the beginning of the year that she died; and it is my recollection that it was in February, but I don't know just what time it was. I looked on my books, to refresh my memory, but I could not find it.
Q. And you had treated her for consumption for a year before that had you, did you not say?
A. Yes, sir; for something about a year.

Q. Who took care of her during her sickness?
A. Mr. Eber B. Roloson.
Q. How far back did the history of the gastritis trouble that he had extend, Doctor?
A. I am not positive in regard to that.
Q. Doctor, what is your best recollection as to the time that the history that he gave of his gastritis troubles, cover?
A. It covers four (4) or five (5) years.
Q. Had you known his wife during all that time?
A. No sir, I had not.
Q. Did you or do you know when her trouble of which she died, first developed?
A. I think possibly six (6) months before I commenced treating her.
50 Q. What did you give Mr. Roloson? Can you remember?
A. I gave him stomach mixture, muriatic acid, dilute, nux vomica, and pepsin.
Q. Did you give him anything else?
A. I gave him elixir of celery and cocoa, for his stomach trouble.
Q. The first prescription you spoke of, I suppose was to assist in digestion?
A. Yes, sir; to aid digestion.
Q. And the second was to tone his nervous condition, was it?

By W. H. HAYNES, attorney for the plaintiffs: That question is objected to, for the reason that it is leading.

A. Yes sir; that is correct.
Q. What else did you give him?
A. I gave him guaicol and cod liver oil, and some quinine for his bronchitis that he had; he had also a little counter-irritant over his chest.
Q. For what did you give the cod liver oil?
A. Mr. Roloson was run down, and I felt that he possibly might develop some trouble from his wife, and I gave that to prevent anything of that kind, if I could, and to do what I could to prevent anything of that sort.
Q. Is consumption an infectious disease?
A. I believe today it is admitted by most authorities to be infectious, yes, sir.
Q. And what is your opinion about it, doctor?
A. In my opinion, it is infectious.
Q. State whether or not Mr. Roloson, in his appearance showed, ever any signs of having been infected in that way, or whether he was susceptible of such?
A. He was susceptible, by virtue of the depraved condition of his system.
Q. State what those words mean; not what they mean, but what it might mean in Mr. Roloson's case?
A. He was emaciated and assimilation was not perfect,
51 and assimilation not being perfect, it would tend to reduce the standard below normal, and he was more liable to be infected, when the resistive powers are below normal.

Q. State whether or not at that time, there was anything in his appearance that indicated tuberculosis or tuberculary infection or tubercuIi condition.

A. No, sir; I think not.

Q. Did Mr. Roloson give you any family history with reference to your treatment or his consultation with you?

—. ——.

Q. In regard to his family history? Did Mr. Roloson give you any history of his family?

A. In connection with himself, do you mean?

Q. Yes sir; in connection with himself?

A. No sir, he did not.

Q. Did he give you any family history with reference to their state of health, in any way, or for any purpose?

A. Not except in insurance. I examined him for insurance.

Q. Then you examined Mr. Roloson for insurance, did you?

A. Yes sir, I examined him for insurance.

Q. In what company?

A. In The Fraternal Home.

Q. Where was that located, doctor?

A. The Fraternal Home, of Hamilton, Missouri.

Q. Had he made application to that company for insurance?

A. Yes sir.

Q. Do you know for how much?

A. For One Thousand Dollars ($1,000.00).

Q. Do you know, either from your own knowledge in connection with the business, or from his statements, whether he received the insurance or not?

A. He did, yes sir.

Q. And did he receive One Thousand Dollars ($1,000.00)?

A. No sir, he did not.

Q. What amount did he receive?

52 A. He received Five Hundred Dollars ($500.00).

Q. He received Five Hundred Dollars ($500.00)?

A. Yes sir.

Q. At what time was that examination made?

A. That examination was made on May 1, 1900.

Q. That was just after you had ceased treating him?

A. Yes sir.

Q. Who brought him to you for examination?

A. The agent.

Q. What was the name of the agent?

A. I am not positive in regard to the agent's name, but I rather think it was Nicholas E. Baker, of Winston, Missouri.

Q. What was the home of the company?

A. It was Hamilton, Missouri.

Q. What was the appearance of Mr. Roloson at that time?

A. He was nervous and emaciated, but had gained to the best of my recollection some two (2) or three (3) pounds in weight, in my treatment of him.

Q. Was the cod liver oil treatment being continued?

A. No sir, it was not.
Q. How long was that continued?
A. About two (2) weeks, I suppose; something like that.
Q. About what time was it when you treated him with cod liver oil?
A. I think that it was in February; along about the time that his wife died, if I remember correctly.
Q. What is the tendency of cod liver oil taken in that way, with reference to the creation of fat?
A. It creates fat.
Q. State whether or not that is what it is given for?
A. Yes sir; that is what it is given for.
Q. And you may state whether or not, you thought that he had responded to that treatment?
A. Yes sir.
53 Q. In what way was his nervous condition apparent?
A. It was apparent in his speech.
Q. How was it apparent in his speech?
A. Nervous condition, trembling of voice; let me say here that that is rather a characteristic of the family; trembling of the voice.
Q. In what other way was his nervous condition apparent?
A. It was apparent in his speech and in his walk.
Q. In what way did it manifest itself in his walk?
A. Rather feeble condition in his walk; short, quick steps.
Q. And in what other way was this condition manifested?
A. It was also manifested in his writing.
Q. Did you see him write?
A. Yes sir.
Q. How was it manifested in his writing?
A. In the trembling of the hand, irregular characters in his writing, when he was writing.
Q. State whether or not he had a cough?
A. He did at the time that I examined him; he had a very distinctive cough, from the bronchitis.
Q. And what is bronchitis?
A. Inflammation of the bronchial tubes; air passages conveying air to the lungs.
Q. Is that ever tubercular in character?
A. Yes sir; not bronchitis, itself is not, but we always have a bronchitis in tuberculosis.
Q. And so far as the cough is concerned, you may state if that has any connection as a symptom of tuberculosis?
A. Yes sir, it has.
Q. State whether or not you made to that company a favorable or an unfavorable report with reference to Mr. Roloson's health, and in his application for One Thousand Dollars ($1,000.00) insurance?

By W. H. HAYNES, attorney for the plaintiffs: That question is objected to, for the reason that the report, if made in writing, is the best evidence.

54 A. Rather unfavorable report.

Q. Did you have any conversation with the agent, with reference to the desirab-lity of this risk?

By W. H. HAYNES, attorney for plaintiffs: That question is objected to for the reason that it is incompetent, irrelevant and immaterial.

A. Yes sir.

Q. Was that conversation in the presence of Mr. Roloson?

A. Yes sir.

Q. What was the condition of Mr. Roloson's health at that time? I am not asking you particularly now, but was he healthy or was he an unhealthy man?

A. He was unhealthy.

Q. In your opinion, was he a proper subject for life insurance?

A. Not for a very large risk.

Q. Will you state the condition of Mr. Roloson on the 1st day of May, 1900, with reference to the probability as to the result of his disease, or diseases?

A. That is a pretty ha-d question to answer. Do you mean by that, the final result, or temporary result?

Q. I mean by that, the final result?

A. Well, I thought that the mental strain that he was suffering from, together with his stomach trouble, and the nervousness, which seemed to be the most prevalent, would have a rather unfavorable effect on his longevity.

Q. Will you state, doctor, the effect of the condition in which you saw him at that time, upon his susceptibility to other diseases, than those that had developed?

A. I regarded him as being susceptible to other diseases.

Q. Did you regard him as being particularly susceptible to anything?

A. Yes.

Q. What would that be, do you say?

A. He would be susceptible to tuberculosis.

55 Q. Did he give you any family history, at that time, that you remember of now?

A. Yes sir.

Q. State as near as you remember what he told you; state, at the time he applied for insurance?

A. He stated that he had one brother that died at the age of forty-two (42), of tuberculosis; his mother died at the age of sixty-three (63) of pleurisy; and his father died at the age of sixty-three (63), of catarrh of the stomach.

Q. What is pleurisy?

A. It is an inflammation of the membrane, separating the chest wall from the lung.

Q. State whether or not, doctor, that is ever tubercular in character?

A. It is, yes sir.

Q. Is there any further family history, there, or did he give you any further family history?

A. He stated that he had three (3) brothers, aged fifty (50), forty-four (44), and forty-six (46), respectively; their health was all given as good'; he had three sisters, aged fifty-four (54), forty-eight (48), and forty (40); their health given as 'good'; and that he had had no disease since the age of sixteen (16) years, and had typhoid fever then.

Q. That is what he told, is it?

A. Yes sir.

Q. Did you know his brothers?

A. Yes sir.

Q. How many of them did you know?

A. I think that I only knew two (2) of them.

Q. What are their names?

A. Cassious and Howard.

Q. Do you know the other one's name?

A. I think that there is another one, but I don't know his name; I am not very well acquainted with him.

56 Q. Did you ever treat any of them?

A. No sir, I did not.

Q. Have you seen them frequently?

A. I did, yes sir.

Q. What was the appearance of Cassious at the time you knew him?

A. Cassious was, in my estimation, the stoutest one of the family, his health seemed to be in the best condition.

Q. Did he appear to be in good condition of health?

A. Apparently so, yes sir.

Q. And how about Howard?

A. He was more after the build of his brother, Eber.

Q. Did you ever notice him particularly with reference to his health or healthy or unhealthy condition or appearance?

A. Well, he was not what would be called, or what I would call a very healthy appearing man; he was slim in stature, and he had very little surplus flesh.

Q. Did you know any of his sisters?

A. I did not, no sir; I think that I saw one of his sisters once; that was all.

Q. State, doctor, whether or not there is any connection between anæmia, and the condition caused by tuberculosis, and other diseases?

A. Tuberculosis causes anæmia; gastritis causes anæmia.

Q. To what extent was Mr. Eber B. Roloson confined to his bed, from November, 1899, to April, 1900?

A. I don't know that he was confined to his bed, except when he had bronchitis, and he was confined to the bed and room for possibly ten (10) days.

Cross-examination by W. H. Haynes, Attorneys for Plaintiffs:

Q. In your examination in chief, counsel for defendant asked you if Eber B. Roloson, at the time you examined him for insurance,

gave you a family history, and you stated that he did? You
57 read from some paper, in order to refresh your memoray, that you had in your hand, did you not?

A. Yes sir, I did.

Q. And what paper is that?

A. That is a copy of the examination that Mr. Sanderson, of Hamilton, Missouri, Supreme Secretary of The Fraternal Home, of Hamilton, Missouri, sent me.

Q. Is this paper that you read from, a copy of your report that you sent in to the company?

A. I suppose that it is; it is as near as I know.

Q. You stated in this report, that Eber B. Roloson, the applicant, for insurance, was ailing of acute dyspepsia, don't you?

A. Yes sir, that is the way it was.

Q. I will ask you if you don't state in this report, that you find him to be in good health in every other respect?

A. Yes sir, I did.

Q. I will ask you if you, in this report, don't say, in answer to this question; "Do you recommend that a Benefit Certificate be issued"? and in answer to that question, you say: "Yes"?

A. Yes, sir, I made that statement in the report.

Q. I will ask you to state, if upon this report of yours, the company, The Fraternal Home, of Hamilton, Missouri, issued him a Beneficiary Certificate for Five Hundred Dollars ($500.00)?

A. Yes sir, they did.

Q. Doctor, I will ask you if it is not a fact that you prescribed the cod liver oil to the deceased, Eber B. Roloson, for a preventitive and a preventitive only, because of his association with his wife?

A. As a preventitive and tonic, yes sir.

Q. And for a preventitive only; that he was not at that time afflicted with tuberculosis?

A. Not according to my diagnosis.

Q. You simply gave it as a preventitive?

A. I thought that bronchitis might possibly develop tuberculosis.

Q. Isn't it a fact that people have bronchitis as long, and
58 even longer than Roloson had it in this case, and it never does develop into tuberculosis?

A. Yes sir, that is correct.

Q. And as far as you know, as Eber B. Roloson is concerned, it never did develop into tuberculosis?

A. No, sir, it did not.

Q. How long did you treat him after you treated him for tuberculosis? About how long a space?

A. Possibly a month and a half (1½ months).

Q. You cured him of bronchitis, didn't you?

A. As far as I can determine, yes sir.

Q. The strongest men physically, and best lunged men have bronchitis, have they?

A. Yes, sir.

Q. You stated in answer to a question in your chief examination, you regarded him as being susceptible to tuberculosis?

A. Yes sir, I did.
Q. Any one is susceptible to tuberculosis, is he not?
A. Yes sir.
Q. And your principal reason in this case, if any, was because of his association, and waiting on his wife?
A. Yes sir, association and depraved condition.
Q. But, after you had quit treating him for bronchitis, and after he had recuperated under your treatment, you had, or then there was no particular reason why you should think that he would be afflicted with tuberculosis?
A. Not so much as before.
Q. What else, besides those things that you have mentioned in your examination in chief, will produce aænæmia?
A. What form of aænæmia?
Q. Well, you give the different forms and definitions?
A. Simple aænæmia may occur from tuberculosis, indigestion, scrofula, a number of those diseases; pernicious aænæmia
59 can be caused by any of those things, by cancer, tumors, surgical operations, and injuries of various kinds.
Q. What kind of aænæmia might be made from mental strain over property or money?
A. Most apt to be pernicious aænæmia.
Q. Might or might not that cause pernicious aænæmia in a very short period of time?
A. Yes sir.
Q. How short a time?
A. Possibly almost immediately.

Redirect examination by Mr. BROWN, att'y for def'ts:

Q. I understand you to say to Mr. Haynes that there was, or was there a letter to the company in connection with this?
A. Yes sir; there was.
Q. This examination that you have mentioned here; that is to The Fraternal Home, of Hamilton, Missouri, was it?
A. Yes sir.
Q. Did that constitute a part of your report to the company?
A. Yes sir.
Q. Have you a copy of that?
A. No sir, I have not.
Q. Did you have any information from the company as to what they wanted you to do, or what they wanted to do with reference to the insurance of Roloson, before you made this examination?
A. Yes sir.
Q. What was it?

By Mr. W. H. HAYNES, attorney for plaintiffs: That question is objected to, for the reason it is not only hearsay, but a conversation in which Eber B. Roloson was not engaged, and took no part in, and a matter between the examining physician and their agent; and objected to for the reason that the letter is the best evidence.

Court over-rules the objections. Plaintiffs excepted for the reasons above given.

A. Their company was new; they were just organizing
60 the company in the town. Mr. Roloson, being a man of influence, the agent said that it was their desire that they have him, and Mr. Roloson said that he did not know whether he could pass or not, and I told him that I would make a brief statement of his case to the company, and see what they said about it; also giving them his standing in the community; and the company wrote back, to give him as favorable an examination as I could; that they were anxious to have him, and send in the report.

Q. Have you the letter?

By Mr. W. H. HAYNES: Objected to, for the reason that the letter is the best evidence.

A. I haven't; I wrote for the letter at the time I wrote for this copy of the report.

Q. I mean the letter that you received from the Company?

By Mr. W. H. HAYNES: Objected to for the reason that the letter is the best evidence.

A. I haven't the letter; no sir.

Q. Have you looked for it?

A. I never filed it away; I did not know that anything more would ever come of it, and I never paid any more attention to it. I am not quite positive whether the letter was to me, or to the agent; we got that instruction from the company, however.

Q. And you made the report and sent the letter, together?

A. Yes sir.

Recross-examination by W. H. HAYNES, attorney for the plaintiffs:

Q. Doctor did you, or do you have any objection to this copy of the examination or medical report, which you testified from in your examination in chief, also in cross examination, that you sent to the company, being attached to your deposition, as an exhibit?

A. I would, without an explanation that there had been a letter included in that.

61 The copy of the report above mentioned, to which the doctor referred in the examination to refresh his memory, is hereto attached, marked Exhibit "A"; and witness says that it can be attached as an Exhibit.

The plaintiff objected to the reading in evidence the following questions and answers in said deposition, on the ground that the said evidence is irrelevant, incompetent and immaterial.

Q. Do you know, either from your knowledge in connection with the business, or from his statements, whether he received the insurance or not?

A. He did, yes sir.

Q. And did he receive One Thousand dollars ($1,000.00)?

A. No sir, he did not.

Q. What amount did he receive?

A. He received Five Hundred Dollars ($500.00).
Q. He received Five Hundred dollars ($500.00)?
A. Yes sir.

Which said objection was overruled by the court, to which action of the court in so overruling said objection the plaintiff at the time excepted.

The said deposition was read by defendant in evidence.

Exhibit "A" attached to the deposition is a copy, without signatures of insured or the medical examiner, of the application to the Fraternal Home and Medical Examination and report thereon hereinafter set out in full.

62 Mr. ISAAC MATTHEWS was first called as a witness in behalf of defendant, and being first duly sworn testified as follows.

Direct examination by Mr. KERR:

Q. Your name?
A. Isaac Matthews.
Q. Your residence?
A. Maysville, De Kalb County, Missouri.
Q. How long have you lived there?
A. I lived in the City of Maysville about eighteen years; in the county all my life about.
Q. Did you know Eber Roloson?
A. Yes sir.
Q. For how long?
A. Well, for I should say seventeen or eighteen years.
Q. Did you know his wife?
A. No sir, I did not.
Q. Did you ever have any converastion with Mr. Roloson concerning his physical condition?

Mr. RANDOLPH: If the Court please, we object to any conversation that this witness had with Eber B. Roloson for the reason that Eber B. Roloson is dead and unable to contradict any state-
63 ment that this witness might make with reference to a conversation with him.

Argument.

The COURT: Objection overruled.

To which ruling of the court plaintiff at the time excepted.

Mr. RANDOLPH: We make the further objection that the time and place are not stated.

The COURT: The objection is overruled.

To which ruling of the court the plaintiff at the time excepted.

Mr. RANDOLPH: We object for the further reason that any statements made by Eber B. Roloson to this witness at any time after the issue of the policy are incompetent.

The COURT: The objection is overruled.

To which ruling of the court plaintiff at the time excepted.

A. Yes sir.
Q. Can you fix the time and place?

A. I can fix the place, but the time I can't get exactly, but I can come close to it.

Q. As near as you can?

A. It was sometime in 1900 I talked to Mr. Roloson in Weatherby.

Q. Weatherby Missouri?

A. Yes sir.

Q. State the circumstances and the conversation?

A. I met Mr. Roloson on the corner between where Mr. McClure was keeping store at that time and the building on the opposite side where Mr. McClure now is—met him on the corner. He was coughing and pale. I knew him well and I stopped and asked him how he felt. He remarked that he felt very badly and had a bad hurting in his throat; was bothered with coughing a good deal, and I also asked him the question how his wife was or something of
64 the kind. He said she was very bad and he rather indicated as though he thought it was a kind of a race——

Plaintiff objects.

The COURT: State what he said as near as you can.

A. He said now that his wife was as bad as he was and he regarded it as a race between him and his wife which would go first. That is what he said.

Q. Your business you state to be that of an auctioneer?

A. Yes sir.

Q. Do you remember seeing Mr. Roloson after the conversation you have related?

A. Yes sir.

Q. Seldom or frequently?

A. I saw him frequently.

Q. What appeared to you to be his physical condition on the occasions when you did see him?

A. Well, I can only speak from what I know from common observation. I would have called him a sick man.

Mr. RANDOLPH: We object to that and ask that it be stricken out.

The COURT: Denied.

To which ruling of the court plaintiff at the time excepted.

Q. Can you call any particular instances in which you saw him and state any particular things he said or did which indicated his condition?

A. I- September 1901 he attended a sale I was auctioning in Gentry county and he remained in his buggy during the day and never got out of his buggy—claimed he was not able to be out and drove from one lot to the other in his buggy.

65 Q. Can you remember any other particular instances of conversations?

A. No sir.

Cross examination by Mr. RANDOLPH:

Q. Where is it you reside?

A. I live at Maysville, De Kalb county, Missouri.

Q. How long have you known Mr. Roloson?
A. I have known him seventeen or eighteen years.
Q. How far have you lived from him?
A. Part of the time I haven't lived, I expect, more than six or eight miles, part of the time when I lived in Fairport.
Q. You lived in Fairport and he lived seven or eight miles northeast?
A. I did part of the time, now live in Maysville.
Q. Then you moved to Maysville and resided about sixteen miles from him?
A. Something like that.
Q. Then he removed from his farm to Weatherby and then you were eight miles from him in another town?
A. Yes sir.
Q. Your business is that of an auctioneer, crying farm sales?
A. Yes sir.
Q. At the time you say you had this conversation with Eber Roloson in 1900 what was your condition as to sobriety?
A. I think I was as straight as a string.
Q. Now the truth is you are very frequently intoxicated?
A. I have been so, yes.
Q. You are and were at that time very frequently intoxicated, were you not?
66 A. Well, not so much in my busy season.
Q. Wasn't it almost an everyday occurrence with you?

Mr. KERR: That is objected to on the ground that it is incompetent, irrelevant and immaterial, except as the question is confined to the particular day on which the conversation occurs.
The COURT: The objection is sustained.

Q. What month was it in 1900 that you met Mr. Roloson at Weatherby?
A. I could not state that.
Q. Do you know what time of the year it was?
A. It seems to me it was rather in the spring of the year.
Q. You say his wife was then alive?
A. Yes sir.
Q. You understood she was very sick?
A. Yes sir; and heard a short time afterwards she was dead.
Q. Mr. Roloson at that time appeared to be in a very depressed condition?
A. Appeared to me like a man suffering considerable.
Q. Very much worried and depressed?
A. Yes sir.
Q. Seemed to be grieving, didn't he?
A. Well, I don't know as to that. As I say, when I met him he had a spell of coughin- there and I stopped and talked to him when we had this conversation.
Q. Now, you are sure this conversation occurred in the spring before his wife died.

A. I told you I was not sure, but to the best of my knowledge I remember it that way.

Q. Before his wife died anyway?

A. Yes sir.

Q. And afterwards you heard his wife was dead?

67 A. Yes sir.

Q. You say it occurred in the springtime or winter?

A. To the best of my knowledge. I wouldn't undertake to fix the time.

Q. Was it later than the spring?

A. I wouldn't undertake to fix it. It was—I think it was the spring of the year.

Q. It is your impression it was cold damp weather at the time?

A. Yes sir.

Q. Do you know to what extent Mr. Roloson was attached to his wife?

A. No sir; never was about his house.

Q. Didn't know his wife then?

A. No sir.

Q. Another time you claim was in September 1901?

A. Yes sir.

Q. And at that time you say he sat in his buggy at the sale?

A. Yes sir.

Q. Where was the sale?

A. Charity Norton's in Gentry county.

Q. How far is that from Weatherby?

A. It must be I expect eighteen or twenty miles—up near McFall.

Q. There was no way of getting there except by going way around by rail, or going there with a buggy?

A. Yes sir.

Q. And he drove there in his buggy that twenty miles that day?

A. Yes.

—. Did you talk to him.

A. Just a little. It was raining and he stayed in his buggy.

Q. Moved around in his buggy from place to place where it was necessary to go at the sale?

A. Yes sir.

68 Q. He didn't go to the house?

A. I don't think he did. If he did I didn't know it.

Q. Was he alone?

A. I wouldn't be positive as to whether he was alone or whether he was not.

Q. Do you know whether any one drove there with him in the buggy?

A. No, I don't. When I went to the barn yard where I had this little talk with him he said he wouldn't get out.

Q. Then he returned in his buggy to Weatherby?

A. I suppose he did.

J. U. CHAFEN was next called as a witness in behalf of the defendant and being first duly sworn testified as follows:

Direct examination by Mr. KERR:

Q. What is your age?
A. Thirty years old.
Q. Will you please mark a paper which I show you, marked Exhibit C—Is that your signature, Mr. Chafen?
A. Yes sir.
Q. Where do you live?
A. I live down at Weatherby, out in the country about three miles.
Q. How long have you lived at Weatherby?
A. About four years.
Q. What was your business during the years 1900 and 1901?
A. I run a livery barn there.
Q. Did you know Eber Roloson?
A. Yes sir.
Q. When did you first get acquainted with him?
69 A. When I moved to Weatherby in 1901.
Q. What time of the year?
A. I couldn't tell you exactly.
Q. The early part of the year?
A. I think so, in the spring.
Q. Did you ever run a hotel?
A. Yes sir.
Q. When and where?
A. Run a hotel at Weatherby.
Q. When?
A. About—it must have been 1904 or 3 I don't know exactly.
Q. Was it not the first year that you went to Weatherby?
A. Yes sir; I believe it was. I would not be positive.
Q. Do you ever remember of seeing Mr. Roloson in other than usual circumstances?
A. No sir; I don't know that I do.
Q. Did you ever see him when he seemed to be otherwise than in good health?
A. Why, I never heard Mr. Roloson complain much.
Q. Did you ever find him lying by the roadside?
A. I seen him one day, he was out there by them big trees by Mr. Harper's, yes sir.
Q. Tell us the circumstances, please?
A. He was just laying there. I went over and told Mr. De Hart; he went over there, Mr. Roloson had got up and went home when he went there, he said.
Q. Do you remember ever having seen him before?

Objected to by plaintiffs as cross-examination by counsel.
The COURT: I will allow the question.
To which ruling of the court the plaintiff at the time excepted.

70 A. I don't know as I ever did.
Q. Do you remember talking to Mr. Smith and myself immediately after Mr. Roloson's death concerning the finding of him by the roadside?

Plaintiff objects on the ground that it is cross-examination of defendant's own witness.

The COURT: You can refresh his memory if you wish to, but you can't impeach your own witness. Anything that will call his attention to the particular occasion or anything of that kind, you may direct his attention to.

Q. You have already said that Exhibit C was signed by you?
A. Yes sir.

Mr. RANDOLPH: I object to examination in that manner. This purports I believe to be a statement.

The COURT: This is purely a preliminary matter. Object when you get to the point.

Q. Do you remember the time when you signed that statement?
A. No sir; I don't recollect just when it was, but I signed it.
Q. Do you now recollect whether you read it over before you signed it or not?
A. No sir, I don't.
Q. Do you remember the circumstances connected with signing it?
A. No sir; I don't recollect a thing about it, but I know I signed it. I will acknowledge that.
Q. With the permission of the court, I will ask a direct question. Did you not in the summer of 1901 live opposite Eber Roloson in Weatherby, Missouri?
A. Yes sir.

71 Q. Did you or did you not in the month of August 1901 about ten o'clock in the morning find him lying in the grass just west of his house under the trees by the side of the road?

Objected to by plaintiff as leading and cross examination.

The COURT: The objection is sustained.

Q. You have said that you had seen Mr. Roloson sometime during the year 1901. Did he at any time say anything to you about his physical condition?
A. No sir.
Q. You said something a moment ago about going to Mr. DeHart, did you not?
A. Yes sir.
Q. You did not finish the statement you were about to make?
A. I went over and told Mr. De Hart that Mr. Roloson was over there. He went over there and he said——
Q. You can't tell us what he said. What Mr. De Hart?
A. Gene De Hart.
Q. You told him Mr. Roloson was where?
A. Over there under the trees by Mr. Harper's.
Q. Did or did not Mr. Roloson state to you at that time that he was weak and unable to get up?

Objected to by plaintiffs as leading and as cross examination.

The COURT: I don't think that question is proper at this time.

Mr. KERR: With the permission of the court I will withdraw this witness at the present time until I get some other evidence which I think will make it more pertinent.

Plaintiffs object to the withdrawal of the witness without cross examination.

71½ The COURT: The right to cross examine will be reserved. You can recall him for purposes of cross examination if you wish to.

WILLIS LAIRD, was next called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. BROWN:

Q. Mr. Laird, where do you reside?
A. I live in Linn county, Kansas.
Q. How long have you lived there?
A. Since November first last.
Q. Did you ever live in Weatherby?
A. Yes sir.
Q. When did you live in Weatherby?
A. I left Weatherby the 20th of last October.
Q. You had lived there how long?
A. Most all my life in that neighborhood.
Q. What did you do while you were living in Weatherby?
A. I run a restaurant some of the time. Hotel part of the time.
Q. Did you know Mr. Eber B. Roloson?
A. Yes sir.
Q. How long did you know him, Mr. Laird?
A. Well, I possibly knew him fifteen years.
Q. How much of that time did he live in Weatherby?
A. Why, not a great while. Possibly he was there not to exceed two years, I don't guess.
Q. And you were there when he died?
A. I was there close, I didn't live in town at the time he died.

72 Q. Did he board with you at any time during that time?
A. Yes sir, he boarded with me, I guess something like two or three months in that neighborhood, I don't remember—he commenced boarding in November.
Q. How did Mr. Roloson appear so far as his health was concerned?
A. Why, he was a sickly man then.
Q. What time was it he begun to board with you?
A. My recollection is November.
Q. What year?
A. 1899; the way I fix the date I was a candidate for the nomination for sheriff in 1898, and afterwards I bought a restaurant and run that that winter and some of the next summer.
Q. And you think it was 1899?
A. 1899 that I rented this hotel from Mr. De Hart.
Q. Do you remember his engaging board at your hotel?
A. Yes sir; I made the contract with him?

Q. State the circumstances of making that contract. If he said anything about his appetite or that referred to it, state what he said?

A. Yes, the contract was $2 a week was what I was paid.

Q. Did he say anything about why he should board as cheap as that?

A. Yes sir. The idea was——

Q. What did he say about it in substance? You need not tell his words but in substance what did he say about it?

Mr. RANDOLPH: We object. His contract for board or his appetite, we object for the reason that it is incompetent and irrelevant.

The COURT: The objection is overruled. The witness may answer. Plaintiff at the time excepted to the ruling of the court.

73 A. He said he was willing to give $2. I told him I didn't think that was enough. He said he would board there at $2 a week a while and if I thought after he had boarded a while that I ought to have more he would pay it. He said I don't eat anything scarcely.

Q. How did he eat?

A. Well, I was well satisfied with the two dollars.

Q. But state what he ate. State about his appetite so far as it affected——?

A. Well, I didn't wait on the table myself.

Q. Didn't you ever sit at the table with him?

A. I have been through the dining room when he was eating.

Q. What did he eat?

A. Didn't eat very much of anything.

Q. Did he ever tell you why he didn't eat much of anything?

A. Well, yes, he told me.

Q. What did he say about it?

A. Well, he was sick, was one reason he didn't eat anything.

Q. What I am asking is whether or not he gave that as a reason, that he was sick?

A. I don't know about that—well we had to cook him extra grub, that is, poached eggs, and toast, he was quite a man for toast.

Q. Did he explain why?

A. He said he couldn't eat grub like some people because it didn't agree with him. He didn't want any meat, didn't eat any meat. I never knowed him eating any meat.

Q. Did he say anything about his health?

A. That has been a good bit ago. I don't remember just what he did say.

74 Q. You don't have to recollect just what he said but the substance of what he said about how he was?

A. I don't know whether I understand you or not.

Q. About his health?

A. Well, about his health, he would come in of a morning—he didn't sleep at my place—if I could go ahead and state the whole business so you could get at it that way, I could get at it better. He slept at his own house and he would come there and get his meals. He was there of a morning early usually and waked us up, and the

other boarders would eat and sometimes he would eat when they did, but he didn't eat but very little, one poached egg and a cup of coffee.

Q. How was it at the other meals?

A. About the same; didn't notice much difference.

Q. What did he say about sleeping?

A. I don't know as he said anything about sleeping. He slept down at his house. He didn't sleep at my place. He slept at home.

Q. What was his appearance? Describe his appearance so far as it indicated his health to your mind?

A. Well, he looked mighty bad.

Mr. RANDOLPH: I object to the statement that he looked bad.

The COURT: The answer can stand.

Q. In what way did he look bad?

A. He looked bad and he coughed. He looked to me like a man that was sick; I ain't no doctor nor anything of that kind; that is all.

Q. How long was he at your house?

A. Well, it was in November, December and some of January; I sold out this hotel sometime in January.

75 Q. Did he get any better apparently, did he appear any better when you sold out than when he went there?

A. No, I would not; I rather thought he was a little worse, seemed like he was not in as good health when I sold out as when he first commenced staying there in the fall.

Cross-examination by Mr. RANDOLPH:

Q. You say you resided at Weatherby a number of years?

A. Yes sir.

Q. And you were in various kinds of business there?

A. Different kinds, yes sir, I was in several different kinds.

Q. What businesses were you in there?

A. Well, I was in the hotel business, restaurant business and the drug business.

Q. Did you run a drug store?

A. Yes sir, a while.

Q. And it was really a drug store, was it?

A. Yes sir, a drug store.

Q. And you knew Mr. Roloson for how long?

A. I knew Mr. Roloson for possibly fifteen years.

Q. Now, you were raised over southeast of Weatherby about four miles, were you not?

A. Southeast of Weatherby.

Q. You were raised in Daviess county?

A. I was born over there near Alta Vista.

Q. Grew up there by Alta Vista?

A. Lived there until I was about nineteen and then moved down by Pattonsburg.

Q. That is some ten or twelve miles from Weatherby in a northeasterly direction?

A. Yes sir.

76 Q. Mr. Roloson lived northwest twelve or fourteen miles over towards King City?

A. Ten or twelve.

Q. When Mr. Roloson came to board with you did his little girl board there?

A. She ate some meals there but I didn't keep count of her meals.

Q. That was immediately after his wife died?

A. It was the following fall I think.

Q. It was the same fall she died?

A. I think it was.

Q. When she died he quit staying at his house excepting to sleep there and came and stayed at your hotel, did he not?

A. Yes sir.

Q. At that time you did not wait on the table?

A. Not ver- often, once in a while.

Q. All you know about what he ate was what you got from other people?

A. Well, I don't know as I waited on him more than one or two times at the outside.

Q. Can you name one specific time when you furnished him eggs and toast yourself and saw him eat it and heard him call for it?

A. I seen him eating there at the table several times.

Q. You don't know what he ate of your own knowledge from having seen him eat?

A. I know he ate poached eggs and toast.

Q. How do you know? Did you bring them in to him?

A. No sir; but then——

Q. Do you know he did not eat anything else?

A. No; I don't.

77 Q. Is it not unusual for people to call for eggs at your hotel?

A. Oh, no.

Q. Nearly all the traveling men who came there called for eggs?

A. There is lots of them calls for eggs.

Q. It is not an unusual thing to eat eggs and toast for breakfast?

A. No sir; I guess not.

Q. He remained then with you during November and December?

A. Part of that time—I did not——

Q. You sold out in January?

A. In January.

Q. Who succeeded you in the hotel?

A. Mr. Miner; I sold out to George Miner and Alta Miner took charge of the place.

Q. Whom did you first tell about these matters?

A. Which matters?

Q. The matters you have testified to?

A. Well, if I understand the first talk I had with anybody in regard to this Roloson business—Is that what you want to get at?

Q. Yes?

A. I believe Mr. Harwood——

Q. The man sitting behind Mr. Brown?
A. Yes sir; I talked to him.
Q. When was that?
A. Been two years ago; something like two or three years.
Q. Where were you living at that time?
A. Near Weatherby.
Q. How did you come to be here today?
A. How did I come to be here today?
Q. Yes?
78 A. Why, there was a man said he was from Kansas City come down there and said he wanted me as a witness up here.
Q. Were you subpœnaed?
A. No sir.
Q. How much money did you get?
A. Not a cent.
Q. Did you pay your own expenses?
A. They sent me transportation.
Q. Did they send you a pass or a ticket?
A. Ticket. I told them I would not come unless my——
Q. You came without a subpœna?
A. Yes sir.
Q. What agreement have you as to compensation?
A. My agreement is with Mr. Brown.
Q. Which Brown?
A. Stephen. S. S.
Q. What is your agreement?
A. Guaranteed my fees.
Q. How much do you get a day?
A. No agreement, except they guarantee my fees.
Q. Agreed to pay your fees?
A. That is all there is to it.
Q. Now, Mr. Laird what was board ordinarily there in town? Ordinarily in town what did it cost?
A. In Weatherby?
Q. Yes, per week?
A. $3.50.
Q. For board and lodging—and you charged him $2 for
79 his meals and that is all there is to it?
A. That is all.
Q. Now, you say Mr. Roloson usually came there in the morning in time to wake you folks up?
A. Usually come to the door and rattled.
Q. Woke you up, got you out of bed—Now, Mr. Roloson did a great deal of work?
A. I don't think he did. I don't know.
Q. Didn't he go back and forth to his farm?
A. When he was boarding at my place?
Q. Yes?
A. I think he made one trip.
Q. Don't you know he made more than that?
A. No sir.

Q. Didn't he feed a lot of cattle?
A. Men that he had hired.
Q. He had one hundred or a hundred and fifty feeding that winter and three or four hundred head of hogs up at his farm?
A. I think he did.
Q. Didn't he buy a great deal of corn there at Weatherby? Wasn't there corn cribbed there at Weatherby that he bought and hauled afterwards?
A. He had corn bought there and hauled out to the place. The boys would come in there and eat—that was a separate deal.
Q. And he stayed at the scales and made the weights himself?
A. Mr. Roloson?
Q. Yes?
A. I don't know about that.
Q. Now the fact of the business is you don't know much about it, do you?
A. About which?
80 Q. About what Mr. Roloson did back and forth there when you were keeping hotel? You don't know much about what he ate?
A. I know he didn't eat very much.
Q. About all you know is that he stayed at your hotel?
A. Yes sir; and he paid me every cent.
Q. He was a man who stood well in the community?
A. Yes sir; a man that everybody seemed to like.

Redirect examination by Mr. BROWN:

Q. Mr. Laird, did anybody besides Mr. Roloson come to you for him at the time he engaged board?
A. In talking about his board?
Q. Yes sir?
A. Why, Mr. De Hart.
Q. Did Mr. De Hart make the bargain with you?
A. No.
Q. What Mr. De Hart?
A. Gene De Hart.

Mr. CRAIG was next called as a witness on behalf of the defendants and being duly sworn testified as follows:

Direct examination by Mr. BROWN:

Q. Mr. Craig, where do you live?
A. Maysville, De Kalb county, Missouri.
Q. How far is that from Weatherby?
A. About eight miles.
Q. What is your business?
A. Buying and shipping stock.
81 Q. How long have you been engaged in that business?
A. Something like thirty years off and on.
Q. Have you ever done business at Weatherby?
A. Yes sir.
Q. For how long?

A. Done business there since 1885.
Q. Did you know Eber B. Roloson?
A. Yes sir.
Q. How well did you know him?
A. Well, I knew him quite well; known him probably for nineteen years.
Q. Did you see him frequently the last two or three years of his life?
A. Yes sir; he lived there in Weatherby I think five or six years the last years of his life.
Q. How frequently did you see him?
A. Well, quite frequently; sometimes, well, quite frequently. sometimes, most every day in the week; sometimes two or three times during the day.
Q. Were you ever with him on business?
A. Yes sir.
Q. How often?
A. Oh, I could not say how often; bought quite a good many cattle of him, trading with him off and on quite frequently.
Q. So far as appearances were concerned how was Mr. Roloson's health during the last two years of his life?
A. Well, the last few years of his life I would not consider his health very good, poor health.
Q. What was his appearance? Describe him as well as
82 you can to the jury?
A. His appearance was that he—well, just about as bad as a man can well be to be traveling around, seemed to have a good deal of energy about him trying to push business along.
Q. Did you ever ride with him through the country?
A. Well, I don't know but I did ride out once maybe with him.
Q. Did he ever complain to you about his health? If so, what did he say?
A. He frequently complained about his health. I would ask him to go out with me—he took quite an interest in stock—and he said his health was such that he could not go.
Q. What did he say, if he ever said, at any time what troubled him?
A. Well, he said he could not go out in the wind, and he was trying—seemed to be afflicted, coughing.
Q. Did you ever hear him cough?
A. Well, I rather think I have maybe.
Q. How often?
A. I could not answer that question.
Q. What I mean, did you hear him, did he cough frequently when you saw him or only once and a while?
A. I could not answer that question direct.
Q. What kind of a cough did he have? Just describe it as near as you can?
A. When he went out in the air he wanted to wrap up around here, around his breast, feared of catching cold, and bad days he would stay in the house as much as possible.

Q. Did he ever complain of any particular trouble, any particular thing that was the matter with him?

A. Well, I don't know that he ever did tell me exactly what ailed him; there was often a remark, frequently nearly every day we would say just traveling around to save funeral expenses. His
83 health was considered very poor. Couldn't do a day's work or anything of the kind.

The COURT: I didn't understand what the witness said. Who said this?

Mr. BROWN: He said "they said?"

The WITNESS: I said the general conversation was among the people around Weatherby.

Mr. RANDOLPH: We object to that and ask that it be stricken out.

Mr. BROWN: I think it is perfectly competent. It is not competent as hearsay, but it is competent as to the general opinion of him in the neighborhood that that was his appearance all the time and not his appearance simply when he was seen by one person.

The COURT: I never knew health to be proved by reputation. It may be it is possible to prove it that way. It strikes me as going too far. I will strike that answer out.

To which ruling of the court defendant at the time excepted.

Cross-examination by Mr. RANDOLPH:

Q. You are in the business of buying and shipping stock?

A. Yes sir.

Q. You have been in the business how long?

A. Since about thirty of thirty-five years. I am fifty-seven years of age and was handling stock before I was twenty-one.

Q. Been in it continuously all that time?

A. Off and on.

Q. And during all that time you lived at Maysville?

A. Yes sir; I have been at Maysville since I came there before I was twenty-one.

84 Q. And been there ever since?

A. Yes sir.

Q. Mr. Roloson lived about fifteen or sixteen miles northeast of Maysville when he lived on his farm?

A. Yes sir.

Q. Have you ever been to his farm?

A. Yes sir; quite frequently.

Q. And Weatherby is eight miles from Maysville?

A. I couldn't say as to eight miles.

Q. Did you ever drive it?

A. Yes sir.

Q. Now, you may state whether or not Eber B. Roloson was ever a fleshy man?

A. No sir; not since I knew him.

Q. He was always a thin spare man?

A. Well, yes, but more so the last five or six years.

Q. Well, he was always thin?

A. Yes sir; spare made man—runs in the Roloson family, what I know of them, the boys.
Q. He was a wiry, quick fellow?
A. I couldn't say he was.
Q. Wasn't he a quick man?
A. No sir; I didn't think so.
Q. He was an ambitious man?
A. Yes sir; an eye to business; he was.
Q. Wasn't he energetic about his business?
A. To a certain extent he was.
Q. Did a large business, cattle feeding?
85 A. Yes sir, quite a large business, the boys did amongst them.
Q. And he fed a large number of cattle and hogs the winter before he died, didn't he?
A. Yes sir.
Q. Do you know when his wife died?
A. No sir; I don't know exactly when she died.
Q. But you know right about the time his wife died that he was feeling badly? Looked badly, didn't he?
A. Well, he has looked worse in the last two or three years than he did prior to that time.
Q. You say he has looked worse?
A. I know he did.
Q. When did you ascertain that fact?
A. I ascertained it every day I would meet him.
Q. Were you subpœnaed in this case?
A. Yes sir.
Q. Was the subpœna served on you, or did you come at the request of the defendants?
A. Well, the sheriff asked me if I would acknowledge the service or wanted him to read it——
Q. Where was that?
A. In Maysville.
Q. How long ago?
A. I disremember the date. I think probably Friday or Saturday.
Q. Now your feelings toward Mr. Roloson for a year or two before he died were not good?
A. They were good, yes sir.
Q. Hadn't you and he had some rivalry in the stock business?
A. No sir; not a man there I respected higher than Mr. Roloson.
Q. You respected him, and more especially that little girl.
—. ——.
86 Q. He stood well in the community?
A. After his wife died always took my sympathy.
Q. He stood well in the community?
A. Yes sir.
Q. Had the reputation of being an honest man?
A. Was with me whatever business I done with him.
Q. I believe you said that up until the time he died he showed a good deal of energy and ambition in his business?

A. Well, yes sir, he was kind of stirring around and looking after his business as well as he could.

Q. Do you know that in the fall when corn gathering time came just before he died the following February he had a large crip of corn down by the railroad?

A. No sir; down where he lived he had a crib.

Q. He built that crib with his own hands, didn't he?

A. Well, sir, I couldn't say he did. I hardly think he did.

Q. Do you know whether he did or not?

A. Well, to the best of my knowledge I would say he would not build the crib.

Q. You think he was not in condition to build a crib?

A. No sir; I don't think he was.

Q. If he had been in condition to build that crib, then you would think you had been mistaken about the condition of his health?

A. I would not think I was. He couldn't do a day's work for me.

Q. How large a crib was it? Quite a large crib?

A. Oh, I expect probably 16 probably by 40, probably larger than that.

Q. Your idea was that he was incapable of performing the work necessary to build that crib?

87 A. He was not capable of doing a day's work.

Q. You don't think he could have done it?

A. No sir; I don't think he could.

An adjournment was here taken to Thursday morning, March 9th, 1905.

THURSDAY MORNING, *March 9th*, 1905.

Court having convened, the cross-examination of Austin Craig was continued as follows:

Q. Mr. Craig, are you acquained with Mr. John Redmond?

A. Yes sir.

Q. Are you also acquainted with Mr. George Rhoads, the lumber merchant at Weatherby?

A. Yes sir.

Q. Do you remember a very short time after the death of Mr. Eber B. Roloson of meeting Mr. John Redmond on the streets of Weatherby and telling him, telling Mr. Redmond, or saying it in a conversation in which Mr. Redmond was present, that you told Eber Roloson during the winter that that cattle deal of his would kill him?

A. No sir; I do not.

Q. And do you remember also stating that if the returns from Chicago had come in in his favor instead of against him that he would still be alive?

A. That is my opinion and I might have said that.

Q. It is your opinion and you say so now?

A. Yes sir.

Q. Do you remember of making the same statement or materially the same statement in the presence of George Rhoads?

A. I don't think I made it in the presence of George
88 Rhoads, because me and George Rhoads ain't very good friends in my estimation. I ain't a good friend of his.

Q. Did you say it in his presence?

A. I don't say I did or did not. I might have.

Q. You remember of saying in Mr. Rhoads' presence that you told Mr. Roloson that cattle deal would kill him?

A. No sir; I did not.

Q. But you did say in the presence of John Redmond that if the returns had come in in his favor instead of against him that he would still be alive?

A. I don't remember that I did.

Q. Well, it is your opinion he would be alive?

Mr. BROWN: We object.

The COURT: The objection is sustained.

Mr. KERR: It already appears in evidence that what was the exact amount of the premiums paid on these several policies the defendant in this case has brought into court and deposited with the clerk pursuant to the provisions of the Missouri statutes. That amount, together with some interest up to the time of the tender made after the death. I understand that it is something we have to prove unless it is admitted.

Mr. RANDOLPH: If the clerk says you have made it.

The COURT: You can find that out and admit it.

Mr. RANDOLPH: We will admit whatever is the fact.

Mr. KERR: We have tendered $225 in connection with the first policy, and $140 in connection with the second policy, making in all the sum of $365.

The COURT: Do you admit that?

Mr. RANDOLPH: That is right.

89 Mr. KERR: That there may be no misunderstanding, the statute, if the *the* court please, is silent on the question of interest ——

Mr. RANDOLPH: We have admitted the sufficiency of it.

The amount so tendered had been deposited in this court for the benefit of the plaintiffs.

Mr. KERR: We now offer in evidence the deposition of J. L. Johnson on file in this case, taken last week.

Said deposition was read in evidence, and is in words and figures following:

Q. You may state your name, age and place of residence?

A. J. L. Johnson, I am 66 years old and reside at Maysville Missouri.

Q. Mr. Johnson what is the present state of your health?

A. My health is not good.

Q. Have you been confined to the house at all recently.

A. Yes, I have, I had what is so call the Grippe, I reckon, that — what every one said it was.

Q. How long have you been confined to the house?

A. It was about a month ago since I first took sick, I have been in the house the biggest part of the time since.

Q. Under the treatment of a physician?

A. Well, I wouldn't say that I was.

Q. Who, if any one, waited upon you and prescribed for you.

A. My son did.

Q. Is he a physician.

A. I don't think he has a diploma, but he is a registered druggist and practices under Dr. Brown.

Q. What is the general state of your health.

A. My health has been bad for 30 years.

Q. State whether or not you have had any recent attacks.

A. No, I don't know that I have, I have a bad case of stomach trouble, that's what is the matter with me, outside of that I am as healthy as any one.

Q. Do I understand you to say that you had an attack of
90 the grippe in addition to your stomach trouble?

A. Oh yes.

Q. State whether or not you have any trouble at night.

A. Yes, I take spells that I can't sleep. I didn't sleep very well last night.

Q. State whether or not you were suffering any pain.

A. No, I don't have very much pain.

Q. I will ask you whether or not you are able to go to St. Joseph, Missouri and attend Court as a witness next week at the trial of this case.

A. I can't tell nothing about what will take place next week, but I know I am not able to go this week and would not go under no consideration.

Q. If your condition is practically the same next week that it is now, will you be able to go?

A. No, I wouldn't.

Q. Mr. Johnson, did you know Eber B. Roloson in his lifetime?

A. Yes sir.

Q. For how long a time had you known him.

A. I have known him since 1875.

Q. Do you recall the circumstances of your last meeting with him?

A. Yes, I can call back I think to the three last times that I met him.

Q. Where was it that you last saw him?

A. That I last seen him, it was at the depot here at Maysville.

Q. Do you remember when that was?

A. Well Sir, I can't exactly call it to mind just when it was, but it appears to me that it was the Spring of that dry year or the Spring just after that, I know that it was after his wife died, because we were talking about that.

Q. To refresh your recollection, I will ask you whether or not the dry year was not the year of 1901?

A. Well, I believe it was. It might have been the next Spring I

wouldn't say, it was about eighteen or twenty months before he died.

91 Q. You stated in answer to a question that you thought it was after his wife had died, I will ask you——

A. I know it was after his wife died.

Q. How do you know that fact?

A. Why, we was speaking about his wife and his child, his little girl.

Q. You were speaking about them at the time then of this meeting at the depot?

A. Yes sir.

Q. Mr. Johnson, now in your own way, just relate the conversation, if any that you had with him at the depot in Maysville.

A. Oh, I couldn't tell all that we said, the train was an hour late.

Q. State whether or not you had any conversation with him at that time and place, in regard to his health.

A. Yes, I did.

Q. Will you relate that conversation?

A. Why, he, we often when we met, we had for several times asked one another concerning our health and in the talk I remarked that I had a deep seated dyspepsia, and he said if he had nothing any worse than that he wouldn't be bothered so bad. I asked him then what was his trouble, and he said it was the so called consumption.

Q. State whether or not any thing was said about his wife's last sickness?

A. I asked him that if he thought he caught the consumption from his wife.

Q. And what did he say?

A. He said that he didn't.

Q. State whether or not you noticed his breath at that time?

A. Yes.

Q. What did you notice about it if anything.

A. Why, we was setting on the trucks, and he gave a little cough, he didn't cough hard, and I catched his breath, and I got up and moved on the other side of the truck, on the South side and set down.

Q. State why you did so.

Plaintiff objects to the question because it is incompetent

92 and irrelevant.

A. Why, I was, his breath smelled exactly like a man that come to my house several years ago that was dying with consumption.

Q. I'll ask you why it was you moved.

Plaintiff objects because the question has already been asked and answered, also because it is incompetent and irrelevant.

A. Why, I didn't like to smell his breath because I had heard that sometimes a body could take consumption in that way, and I wasen't very stout and didn't want to run no chances.

Q. State whether or not there was any odor to his breath.

A. Yes, it smelled bad.

Q. Did you or did you not at that time, notice whether he had a cough.

A. Why he only coughed that one time that I recollect of.

Q. Was there any one present at this conversation?

A. There was at a part of it, Mrs. Miller.

Q. Does she live in Weatherby?

A. She did live in Weatherby, but she is dead.

Q. At that time did Mr. Roloson say how long he had had consumption.

A. No; he didn't.

Q. Did he tell you whether or not he had been advised by a physician that he had consumption.

Plaintiff objects because the question is leading and suggestive of an answer.

A. Why, I asked him if he had ever been examined to know that if he did have consumption, that is the first conversation, and he said that he had, but that he knew of himself that he had it, that he understood human nature well.

Q. What did he say to you, or tell you that the physician said about his condition, if any thing.

A. Why, I don't remember whether he told me anything about it or not, only that he said he had been examined several times.

Q. If you recall what he said, if any thing, that the Doctors said about his condition, please state it.

93 A. Well I couldn't do that, I don't recollect.

Q. When was the first conversation that you speak of?

A. Well, I couldn't tell you the time, but it was about the time that he was moving to Weatherby.

Q. I'll ask you to state what it was he said.

A. Why we met in the Road and he either said that he was going to move to Weatherby, or else just had moved.

Q. State whether or not he said anything to you at that time about the condition of his health.

A. Why, I remarked to him that I would have thought that he would have hated to have left his farm and my best recollection is that he said he hadn't been living on his Farm for a good while but had been living in McFall.

Q. How long have you lived in De Kalb County.

A. I come here in 1856, I as a boy when I come here.

Q. State whether or not Mr. Roloson told you anything about his condition, and whether or not he stated anything about what the Doctors advised him.

A. No, if he did I don't recollect it.

Q. As I understand you, you mean that you do not recall that he said anything about what the Doctors advised him.

The Plaintiff objects because it is a repetition of the question, which has already been answered by the witness, and is also incompetent and irrelevant. Objection overruled—Plaintiff excepts.

Q. What did he say, if anything that the Doctor had told him was the matter with him.

Objected to by plaintiff as being a repetition of a question, heretofore asked and answered by the witness. Objection overruled. Plaintiff excepts.

A. Why, he said the Doctor said that his lungs was affected.
Q. Did he tell the name of the Dr.
A. No, I don't think he did, I don't recollect that he did, its been a good while since.

94 Cross-examination by PLAINTIFF:

Q. Mr. Johnson, are you a man that reads much and keeps yourself well informed.
A. No, I don't read much, I read some, my eyes are so bad of late that I can't read much.
Q. You read both print and writing.
A. No, I can't read writing.
Q. You can write can't you.
A. No, sir.
Q. How long have you lived in De Kalb County.
A. I think it was 1856, no I guess it was 1857, we moved to Daviess County in 1856.
Q. How much real estate do you own.
A. I just own property here in town.
Q. How did the attornies for the Defendants in this case learn that you knew the facts that you have testified to in your examination in chief.
A. I couldn't tell you. I can tell you what I think about it, I never have seen none but this man.
Q. You mean to say that you never saw any of them except Mr. Mosman, the Attorney for the defendant, who has just examined you.
A. Yes sir.
Q. How often did you see Eber B. Roloson in the last Ten or Twelve years before his death.
A. Why I didn't see him the last ten or twelve years, he lived up at McFall and I lived down here, I didn't see him more than ten or twelve times and maybe not so often.
Q. Mr. Johnson how is your memory.
A. Why some times it is pretty good, and some times it ain't so good.
Q. Well as a whole your memory isn't very good.
A. Well I think that when I hear anything I can generally tell how it is, I always have.

Q. Why is it then that you just stated that some times
95 & 96 your memory is pretty good and some times it is not.
A. Well sir, any man that has a stomach trouble as long as I have had it, some times he can't recollect very well, and then some times when he gets over it he is all right and recollect as good as anyone, now if you had come here yesterday I wouldn't have talked to you, that is on this.

Q. Do you think you would have recollected yesterday what you do today.

A. Oh, yes, I would have recollected it.

Q. Why is — then that you wouldn't have talked about it yesterday.

A. Why yesterday, I as in bed about half the day and feeling awful bad.

Q. Where were you the other half of the day.

A. Why I was knocking around the place, walking around the yard.

Q. Was you in the Town of Maysville yesterday?

A. No sir, I wasen't.

Q. Was you in Maysville day before yesterday.

A. I went through Maysville but didn't stop, I haven't been to Maysville but twice in a month.

Q. What was you going through Maysville day before yesterday for.

A. Why I drove through in a wagon, one of my sons was moving and he asked me if I wouldn't go and drive the wagon for him and let him drive his hogs and I done so.

Q. On that trip how far did you go from your home.

A. Why it is a mile and a half out there, said to be.

Redirect examination:

Q. How far is your house from the Court House at Maysville.

A. It is not a quarter of a mile.

Q. Do I understand when you answered on cross examination, that you do not write, that the reason was because of *his* eyes.

A. No, I never could write.

97 WILLIAM E. JOHNSON was next called as a witness in behalf of the defendant, and being first duly sworn, testified as follows:

Direct examination by Mr. KERR:

Q. Where do you reside?

A. Maysville, Missouri.

Q. What is your occupation?

A. I am in the drug business.

Q. How long have you been engaged in that business?

A. I have been about five years in the drug store, I guess.

Q. At Maysville?

A. Yes sir.

Q. Did you know Eber Roloson during his life time?

A. Yes sir.

Q. When did you first become acquainted with him?

A. Well, the first time I remember of seeing him, I suppose was about twenty-two or three years ago, I don't just know.

Q. Where was he living then?

A. He was living up north somewhere, I don't just know where.

Q. What county?

A. De Kalb.
Q. Where were you living?
A. Close to Weatherby, about four miles north of there.
Q. Have you lived in that county since that time continuously?
A. Yes sir. Well, I have been in Maysville for the last fourteen years.
Q. How frequently did you see Mr. Roloson during the last eight or ten years of his life?
A. Well, up to the last five or six years I didn't see him very frequently. In fact, I lived at Maysville, but since that time
98 until he died I would see him frequently in Maysville.
Q. How frequently.
A. Well, I could not just tell; perhaps three or four times a year or more, maybe; I met him on the street mostly.
Q. Did he ever come to your drug store?
A. Yes, sir; I have seen him in there.
Q. What was his appearance during the years 1900, 1901 and thereafter until his death?
A. Which?
Q. Physical appearance?
A. In regard to his health you mean?
Q. Yes?
A. Well, I didn't consider it very good.
Q. What is there about his physical appearance that made you think that his health was not good?
A. Well, he looked like——

Mr. RANDOLPH: We object. He ought to describe him instead of giving his opinion.

A. He was a thin, sallow looking fellow, didn't look like there was very much to him in the way of health. Looked as if he had no health to look at him. Of course, I never asked him anything about his health, just judging from his physical appearance, meeting him.
Q. What was his color?
A. He looked somewhat emaciated; acnemic, like he had not very much blood in him.
Q. What about the question of his having or not having a cough?
A. Well, I never talked to him very much. I could not
99 say anything about his cough, never heard him cough that I know of.
Q. Did you ever talk to him about his health?
A. No, sir; never talked to him about his health.
Q. Did you observe his walk?
A. Well, he moved around slowly. He didn't move around very briskly, yes, I noticed his moving around considerable.
Q. Describe to us the entire physical conditions which led you to the conclusion you have mentioned, in your own words, so the jury will understand?
A. Well, just this. I considered him a sick man all the time; that was my opinion; just like he was hardly able to go.

Mr. RANDOLPH: We are insisting that this is incompetent evidence. These kinds of descriptions and opinions of laymen and not of physicians. We ask that it be stricken out, and that the evidence be restricted so such things will not occur.

The COURT: I think a layman is entitled to state how a person appeared to him, whether he appeared well or sick, and when this man states that it is his opinion, I suppose all he means by it is, that that is the way it appeared to him.

Q. Did you remember of any particular occasion when Mr. Roloson was in Maysville during the year 1901?

A. Well, about that time he came in the store one evening along in the middle of the afternoon, and was very anxious to see Dr. Brown. I told him that I didn't think Doctor would be until after train time, perhaps about nine o'clock. He said well, he wanted——

Q. Was Dr. Brown there at that time?

A. No sir.

Q. Was Roloson to your knowledge in your store after that?

A. No sir; I never saw him—that day you mean?

100 Q. No. At any time after that?

A. No; I never saw him any time after that until that fall sometime inside of a year, he was in there one evening, came there one evening.

Q. In your store?

A. Yes sir; in the store.

Q. Was Dr. Brown there at the occasion of this last visit of Mr Roloson to your store?

A. The last time I remember of seeing him, yes sir, Dr. Brown was there.

Q. Did you or did you not point out Eber Roloson, indicating him by name to Dr. Brown on this last occasion?

A. Yes sir.

Cross-examination by Mr. RANDOLPH:

Q. Mr. Johnson, how old are you?

A. I am about thirty-six years old; thirty-seven I believe my next birthday.

Q. Until you were about seventeen years old you lived in the northeast part of De Kalb county?

A. I lived about three or four miles north of Weatherby, Dallas township.

Q. On what was known as the Truax farm?

A. Truax's, yes sir.

Q. Living there thirty-one years ago?

A. I don't know just what year, something about that.

Q. Did you know Eber Roloson in 1874?

A. I knew of him about the time we moved to the farm.

Q. About the time he moved into that community?

A. When we moved on the farm I think he was teaching school.

101 Q. Where did he live at that time?

A. I don't know just where, but we would see him frequently riding through the country.

Q. At that time he was a young man, twenty-six or twenty-seven or twenty-eight years old, along there.

Q. He was thin, spare man then, was he not?

A. Well, I think—of course, as I said I didn't know so much about his health, didn't pay attention——

Q. I am not asking you about his health. He was a thin spare man was he not?

A. Yes sir; I think he was.

Q. You never saw him at any time when he was not thin?

A. No sir; never did.

Q. And you had seen him at frequent intervals for thirty years?

A. No sir; I don't hardly—somewhere about that, twenty-five years, I believe I have stated.

Q. Since 1874 hadn't you seen him?

A. Somewhere about that time, ever since I was a small boy.

Q. Ever since you can remember anybody in the neighborhood you can remember Eber Roloson?

A. Yes sir, among the first.

Q. And he was a thin spare man?

A. Yes sir.

Q. And was always a thin spare man?

A. Yes sir.

Q. You say he was teaching school when you first knew him?

A. I don't know whether he was or not, but to the best of my memory he was.

Q. He had a 280 acre farm up seven or eight miles, maybe
102 ten miles north and a little west of that Truax place?

A. I don't know anything about the land.

Q. Was you ever on the farm?

A. No sir; I may have, but don't as I know of.

Q. You never saw him moving about his work?

A. No sir.

Q. The only occasions on which you ever saw him was when he was in Maysville then in the last 14 years?

A. Well, coming to our house, he was at our house frequently. We used to feed a great many cattle and he was there feeding and helping every few days.

Q. That was when you lived on the farm?

A. That was about sixteen or seventeen years ago.

Q. Now then in the last fourteen years all you have ever seen of him was when you were in Maysville?

A. Yes sir, meeting him.

Q. On the street, walking around, when he was loafing along the streets?

A. And have seen him over at Weatherby.

Q. And you have been to Weatherby how often?

A. I stayed at Weatherby something like eighteen months out of the 14 years.

Q. What time was it you stayed there? How long ago? Fix the year?

A. Well, it was something like ten years ago.

Q. He was not living there in Weatherby at that time?
A. No sir; I don't think he was.
Q. You saw him there once and a while the same as at Maysville?
A. Occasionally.
Q. Did he have any neighbors up about his farm, do you know?
A. I don't know.
103 Q. Is Dallas a thickly populated township or not?
A. I think it is.
Q. He probably had a good many neighbors there?
A. Yes sir; I suppose he did.
Q. Now, you saw him perhaps two or three times during this 14 years?
A. Yes sir, only towards the last.
Q. What was the color of his hair?
A. Well, his hair was rather of a light color, not exactly red hair to the best of my memory.
Q. What do you say it was?

A. Defendants object on the ground that the question is not cross-examination and as immaterial.

The COURT: The objection is overruled. It goes to the credibility. To which ruling of the court defendant at the time excepted.

A. I know his moustache was red, nearly red.
Q. What was the color of his hair?
A. I suppose the color of his hair was something like it. As many times as I have seen him I don't know the exact color of his hair. It was light color.
Q. It hadn't turned much gray, at the time he died the gray was scarcely observable in it?
A. I would not say for certain.
Q. Was the gray observable in his moustache?
A. I would not answer that.
Q. How old did he appear to be the last time you saw him?
A. Well, I suppose somewhere between 50 and 55. Of course, the way he got around he looked really older than what he was.
Q. In the face he was a young looking man, to stand and look in his face?
104 A. I don't know as he did. As you get acquainted with a person they seem older than they are sometimes.
Q. Really now he was a young looking man in the face, wasn't he?
A. I wouldn't say that.
Q. You would not say he had an old-looking face, would you?
A. Well, of course I have seen older men, but I would not say he had a young looking face by any means.
Q. He was what you would call a light complected man?
A. Well, of course, his skin was somewhat red.
Q. He had some red in his face all the time?
A. Not a red, but a sallow color, complexion.
Q. He had red in his face?
A. Not a real healthy red.
Q. He was not a pale man was he? Was his face pale?

A. He was not what you would call a white man, just a sallow look; that is the best I can tell you.

Q. You say you saw him in the drug store? He came in one night you say?

A. No sir; along in the evening, between four and five o'clock.

Q. Who was with him?

A. By himself.

Q. When was that?

A. I don't just know, I could not give you the year exactly. Somewhere about 1900.

Q. What time of year was it?

A. Well, it was in cold weather. Wasn't exactly in the summer time. I think it was later, perhaps in the fall of the year nearly.

Q. Was that in the summer or was it in the spring or fall?

105 A. I think the probabilities are it was late in the summer or early in the fall, fall month.

Q. Nobody was with him at that time?

A. No sir; no one with him.

Q. How long did he remain in the drug store?

A. Oh, I should judge he remained a few minutes, five minutes perhaps. He came back again, I think after he was in the first time.

Q. How much later was it when he came back?

A. He came back just before he started away. The 8 o'clock train was due.

Q. West to Weatherby?

A. Yes sir, going to Weatherby.

Q. Where was Dr. Brown at that time?

A. Couldn't tell you. In the country somewhere.

Q. Was Dr. Brown in partnership with you in the drug business?

A. Yes sir.

Q. And you are still in partnership?

A. Not right now. Dr. Brown sold his part of the drug store out the other day.

Q. Did you buy them or some one else?

A. Some one else

Q. Where was Dr. Brown's office?

A. At the old original stand you know. You know where that was the McKinnon block, about a 100 yards east of our store.

Q. Your store faces the west?

A. Yes sir.

Q. Go half a block south and about a block and a half east to get to it?

A. Yes sir; just about.

106 Q. Did Dr. Brown stay about the drug store?

A. No sir; he didn't make a practice of staying about there.

Q. Did he examine the patients about the drug store?

A. Well, he didn't make an examination. He either took them to the office——

Q. Did he ever examine people for life insurance about the drug store?

A. I think he has, but he made a practice of taking them up to his office.

Q. Sometimes took them to the office?

A. Yes sir; most generally to the office.

Q. When was he there again?

A. Well, I didn't see him there any more, I believe, in the store until about a year later, something like that.

Q. About a year later?

A. One evening about a year later.

Q. That was about the summer of 1901?

A. I wouldn't say what year. Anyhow it was between ten and twelve months later.

Q. The first time you say was in 1900?

A. I wouldn't just say the year.

Q. If you are right on that, the second time was 1901?

A. Yes sir; if you make that the basis.

Q. At that time where did you see him?

A. The second time I was out the back way. He came in and was wanting to buy a school book, and Dr. Brown was looking for the book with him and he couldn't find it, so he called me up, and I went up and waited on him. I talked to him quite a little while.

107 Q. Was Dr. Brown talking with him too?

A. No sir; no further than what was said about the book. He left and I went to the back end of the store with Mr. Roloson.

Q. You started to say he wanted something?

A. I said he wanted a school book.

Q. Was that all that was said at either one of these times?

A. The first time, as I said, he wanted to see Dr. Brown.

Q. What did he say he wanted to see him for?

A. He didn't say.

Q. And the second time he wanted a school book?

A. He wanted a school book.

Q. Did you see him any more?

A. No sir; I never saw him any more.

Q. Did you say in your direct examination that the last time you pointed out Dr. Brown to him?

A. This was the time he got the book.

Q. Why did you point Dr. Brown out to him?

A. He left and Dr. Brown said who was the man I was talking to. I was talking to him quite a little while; we were not busy. He asked who he was and I said "You ought to know him; you examined him for life insurance"——

Q. I don't care for the conversation between you and Dr. Brown. I want to hear the conversation between you and Mr. Roloson?

Mr. Kerr: I submit that he having given part of that conversation in response to the question is entitled properly to tell the whole conversation.

The Court: He has no right to show any more of that conversation. It was not to his statement.

To which ruling of the court the defendant at the time excepted.

108 Q. I ask you what you and Mr. Roloson had talked about—You said you pointed Dr. Brown out to him, I ask what you and Mr. Roloson had said?

A. I never said I pointed Dr. Brown out to him; no sir.

Q. That was a mistake?

A. Yes sir.

Q. You didn't point Dr. Brown out?

A. No sir.

The COURT: He stated he pointed Mr. Roloson out to Dr. Brown.

Q. Do you know Dr. Brown's signature?

A. Yes sir.

Q. Do you know his handwriting?

A. Yes sir, I think I do.

Q. Can you identify it?

A. I think I can.

Q. I show you a paper here that I want you to state whether or not that — in the handwriting of Dr. Brown, or whether or not at the bottom that is his signature? (handing paper to witness).

The COURT: Which one of those papers?

Mr. RANDOLPH: It is the medical report. It is the upper one.

Mr. KERR: We object to it as incompetent, irrelevant and immaterial and not cross-examination.

Mr. RANDOLPH: I have not offered — in evidence. I am having him identify it for future purposes in the case.

Mr. KERR: The objection is withdrawn.

Q. I just want to know if this is his signature? Is that his handwriting?

A. Yes sir; that is his signature.

Q. Is the body of it here in his handwriting?

109 A. I will have to look all over it. Yes sir.

Q. That is his handwriting, is it?

A. Yes sir; the body of it is his handwriting.

Paper was here handed to the stenographer and marked by him paper identified by W. E. Johnson.

Q. Now, Mr. Johnson, you are a son of the John L. Johnson whose deposition was just read before you were called on the witness stand?

A. Yes sir.

Redirect examination by Mr. KERR:

Q. Showing you, Mr. Johnson, the paper to which your attention has just been called, do you intend to state that all the writing of that paper is the handwriting of Dr. Brown?

A. No sir.

Q. Do you mean to say that you identified anything but the signature of Dr. Brown as his handwriting?

A. Well, of course here is some writing that he wrote. Eber B. Roloson is not in Dr. Brown's handwriting.

The COURT: Eber B. Roloson at the top is not in Dr. Brown's handwriting?

A. No sir.

Q. Is there anything else on that that is not in his handwriting?

A. Here is at the bottom "Eber B. Roloson" is not in Dr. Brown's handwriting.

Q. Calling your attention to some further writing on the left hand corner at the bottom, in whose handwriting is that?

A. I think that is Dr. Brown's handwriting.

Q. Calling your attention to the word "no?"

A. Here is something that is not in Dr. Brown's handwriting is "yes."

110 Q. In answer to what question? What number?

A. The second.

Mr. RANDOLPH: I object to the remarks unless the contents of the paper is given; I object to disjoined parts.

The COURT: Objection overruled. He may refer to the number.

A. No. 2 answer is not in Dr. Brown's handwriting?

The COURT: The answer to No. 2?

A. Yes sir.

Q. Calling your attention to the answer to No. 3, is that in Dr. Brown's handwriting?

A. Well, I couldn't say for certain about that. I can't say for certain about No. 5, 4 and 5, nor 6 is not. I don't think 6 is in Dr. Brown's handwriting.

Q. What about the answer to question 7?

A. Well, I couldn't say for certain about that.

Q. And the answer to No. 8?

A. I couldn't say about that.

Q. It appears from that paper that the answers to those questions you have mentioned have been written twice. Can you identify the handwriting in either case, the original handwriting or the writing over it, in answer to those questions?

A. State the question again.

Mr. RANDOLPH: I object to the question because on the part of the attorney it assumes to state a fact.

Mr. KERR: I will submit the paper to the court.

The COURT: Let him answer it.

A. Do you want to know whether or not it has been written more than once?

111 The COURT: He wants to know whether you can identify either the original or the second writing, if you think there is such a writing there, as Dr. Brown's handwriting?

A. There is a second writing, yes sir. I couldn't say for certain about that.

Q. Can you identify the original writing in answer to those questions as the writing of any particular person?

A. No sir; I can't.

Q. Mr. Johnson, you gave us part of the conversation at which you identified Mr. Roloson for and to Dr. Brown. Will you please give us the whole of that conversation and make plain to us how you identified it?

Mr. RANDOLPH: We object to that question, because it is impossible to tell from it whether it calls for a conversation between this witness and Dr. Brown, or this witness and Eber B. Roloson and if it calls for a conversation between this witness and Dr. Brown, we object.

The COURT: The objection is sustained.

To which ruling of the court the defendant at the time excepted.

Recross-examination by Mr. RANDOLPH:

Q. These questions that you spoke about are just these up here, the words "no" and "yes" that you are speaking about?

A. Yes sir, and this one here.

Q. And the word "widower?"

A. Yes sir.

Q. Now, where it appears to be written over it is the same word underneath "no" and "yes," and apparently the same word written over to strengthen it?

Mr. KERR: We object; the paper speaks for itself.

112 The COURT: Objection sustained.

Q. From where this question 9 is here down the body of this is in Dr. Brown's handwriting?

A. I expect I will have to look that over.

Q. Look it over carefully. I want to know definitely.

A. Yes sir. It is all in Dr. Brown's handwriting save the signing "Eber B. Roloson" name, from there down.

Q. You say except the words "Eber B. Roloson; retired farmer; Weatherby, Missouri" in the corner?

A. Yes sir.

Q. And with the exception of the word "yes" appearing once, and the word "no" appearing five times and the word "widower" and the signature "Eber B. Roloson" at the bottom, that all the rest is in Dr. Brown's handwriting?

A. Yes sir; I think I do.

Q. That is Dr. J. M. Brown, of Maysville, Missouri?

A. Yes sir.

JOHN REDMON was called as a witness in behalf of the defendant and being first duly sworn testified as follows:

Direct examination by Mr. KERR:

Q. Mr. Redmon, where do you live?

A. I live in De Kalb county, Misouri.

Q. Where?

A. De Kalb county, Missouri.

Q. In what direction from and how far from Weatherby?

A. Why, it is five and a half or six miles northwest.

113 A. Farmer.

Q. How long have you known Mr. Eber B. Roloson?

A. Well, I have known him for quite a few years; something like eight or ten years.

Q. How frequently did you see him during the last four or five years before he died?

A. Well, some weeks I would see him almost every day, say three or four days out of a week, and possibly a week would pass or two I wouldn't see him at all. I would see him generally when I would be in Weatherby with stock or something.

Q. Can you describe his physical appearance and condition as it seemed to you during the last three years of his life and will you do so?

A. Well, he appeared feeble and nervous to me.

Q. Tell us all about it. Tell the jury in your own language how he looked?

A. Well, he had a kind of yellow color I thought; didn't have much blood in his face; he was thin; moved around a little feeble and slow.

Q. Do you remember whether or not he used to cough?

A. I don't think I have heard him cough real hard. I don't recollect he coughed real hard or made long sieges of heavy coughing. I noticed him give a little cough. He was generally bundled up around the throat. He generally coughed just a little you know.

Q. Was it the kind of a cough that a man gives when he has a bad cold or a shorter cough?

Mr. RANDOLPH: If the court please, it seems to me they go quite a ways for people who are non professional in their opinion.

114 The COURT: A layman is competent to talk about coughs, I think. He may answer it.

A. Why, well, it was a shorter cough than I cough when I have a bad cold.

Q. Can you describe his cough with any more detail than that?

A. Well, I don't know as I could; just a kind of a short hacking cough.

Q. A short, hacking cough. Did he cough in this fashion frequently or seldom?

A. Well, it didn't seem to me as though you would stand and talk to him long until he would cough a little.

Q. What about his eyes?

A. Well, his eyes would water a right smart, I noticed. By watering, water kind of running from his eyes here, and he seemed to be kind of nervous; his head would jerk as he talked.

Q. Do you remember the time of Mrs. Roloson's death?

A. Well, no, not as to dates or anything. I recollect at the time she died.

Q. Did you soon after her death have any talk with Mr. Roloson, or hear him talk to other people about his own health?

A. I never had any talk with him about his health.

to other people after his wife's death?

A. Well, I think I did. I heard him talk to some other parties.

Q. Where?

A. It was in Weatherby.

Q. When as near as you could fix the time?

A. Well, it was just shortly after his wife's death, I think.

115 He was just standing talking to three or four men—I don't think I could recollect one he was talking to. As I walked up, I noticed he was looking awful bad; he was leaning right on the hitching rack right at the blacksmith shop. As I walked up I heard him say I don't have any other idea only to go the same way myself. I stood there a few minutes and he kept on talking about his wife.

Q. Did he talk at that time or was the conversation concerning the cause of his wife's death?

A. I don't know that it was in particular. I didn't stand there but a minute; just passed on.

Q. In your opinion was his health the same practically for three or four years before his death continuously, or did it change in one way or the other?

Mr. RANDOLPH: I object to the question as leading.

The COURT: It is — leading question, but I don't see how the form is in any way prejudicial. I will allow it. You may answer it.

A. I didn't notice any great changes. It looked like he gradually got a little weaker all the time.

Q. Up to the time of his death?

A. Yes sir.

Cross-examination by Mr. RANDOLPH:

Q. Mr. Redmond, how far do you live from Weatherby?

A. About five and a half miles.

Q. You live five miles northwest of Weatherby?

A. About five or five and a half.

Q. You are quite busy most of the time, are you not, Mr. Redmond?

A. Yes sir; a great deal of the time.

116 Q. You don't spend much time loafing around town?

A. Well, I am at town quite often.

Q. You are there quite often?

A. Yes sir.

Q. When did you first notice that Mr. Eber Roloson appeared nervous, feeble and distressed?

A. The first time I ever recollect of seeing him.

Q. How long ago was that?

A. Possibly eight or ten years ago.

Q. Possibly eight or ten years ago. He was a very spare man always since you knew him, wasn't he?

A. Yes; always thin.

Q. And always thin. Looked about the same up until he died?
A. He gradually got worse I thought.
Q. He gradually got older, didn't he?
A. Yes sir.
Q. He was very much the same considering the years that grew on him, wasn't he?
A. I didn't notice any big change, just gradually.
Q. No big change. Just his years grew on him?
A. Yes sir.
Q. He was always a very thin spare man?
A. Yes sir.
Q. And that was readily noticeable by any person who observed him, wasn't it?
A. Yes sir.
Q. He was a well known man?
A. Yes sir; I think so.
Q. Was extensively known over the country?
A. Yes sir.
117 Q. Did you know him when he lived on his farm?
A. Well, yes, I knew him; didn't see him very often for it was ten or twelve miles.
Q. You were raised in that country where you live now?
A. Yes sir; in that county, De Kalb.
Q. Close to where you live now?
A. Five or six miles.
Q. South of there?
A. South and east.
Q. You are how old?
A. 39.
Q. But you don't remember Mr. Roloson until the last ten or twelve years before he died?
A. No; I don't recollect him. I was not much acquainted with him anyway.
Q. He did a good deal of business, didn't he?
A. Well, I suppose he did.
Q. Now, the first time you noticed him being feeble, was that right after his wife died?
A. Yes; I took more notice right after that.
Q. You knew he had a very strong affection for his wife, didn't you?
A. No sir; I didn't know it.
Q. Didn't he express that at times?
A. Well, I don't know that he did when I would be with him.
Q. He was very much distressed at least that time you saw him leaning on the rack?
A. Seemed to be.
Q. And was in a very disturbed frame of mind wasn't he?
118 A. Yes sir; seemed to be.
Q. You attributed that at that time to his wife's death?
A. Yes sir; I suppose I did by his talk there.
Q. And in that frame of mind he said he had no other anticipation except to go the same way his wife did?

A. I don't think he said his wife; just the same way himself.
Q. You understood he was speaking of his wife?
A. Yes sir; I supposed he was.
Q. How long had she been buried at that time?
A. I couldn't say exactly; don't seem to me as if it was very long.
Q. Just a few days previous?
A. It might have been a month.
Q. And it might have been a week?
A. Yes sir.
Q. Now, after that did you see him along during the winter?
A. Yes sir.
Q. And the next summer?
A. Yes sir.
Q. The next summer he bought cattle extensively, didn't he?
A. Well, yes, I think the Roloson brothers did. He always said "we." I don't know whether there were three or four.
Q. He seemed to be the business man among the boys, handled the business?
A. I don't know whether he was.
Q. Did you ever come with him to St. Joseph to buy stock?
A. Yes sir; several trips.
Q. When was the last time you were with him in St. Joseph to buy stock?
119 A. I think it was the last trip he ever made to St. Joe, but as to dates——
Q. When was that?
A. I say as to dates I couldn't exactly make the dates, but I think the December before he died in February.
Q. When he was down here buying stock you were around in the pens with him?
A. Yes sir; some.
Q. He went around to look at the stock himself, didn't he?
A. Yes.
Q. And bought himself?
A. Yes; he had a commission man.
Q. He did the same as all farmers, went and looked at the stock, and bought them through a commission man?
A. Yes sir.
Q. You think that was in December before he died?
A. I rather think it was. I wouldn't make it positive.
Q. Had you ever been to St. Joe with him before that?
A. Yes sir; I have been here with him several times; four or five times.
Q. Where did he stay when he came down?
A. First one place and then another.
Q. Did you stay together?
A. No, we didn't always stay together.
Q. And he went up in the yard just like you did to buy stock? Didn't he?
A. Yes sir.
Q. And performed his business duties just as quickly as you did and got away as quickly as you did ordinarily?

120 A. Yes sir; I think so.

Q. Now, Mr. Redmond, your mind is impressed with his condition at the time his wife died, at the time he was leaning on the hitching rack there?

A. Well, that is one time.

Q. That is one time that impressed your mind?

A. Yes sir.

Q. Another time that impressed your mind was his condition when he met with his losses just before he died? You saw him about then just before he took to his bed?

Mr. BROWN: If the court please, we don't think it is proper for the gentleman to assume facts that are not in evidence and that may be material one way or the other. He has assumed that he met with losses just before he died, and that may be a separate material fact in itself.

The COURT: There is some evidence in the case already that he met with losses. The objection is overruled. He may answer.

To which ruling of the court the defendant at the time excepted.

Q. You heard the result of his cattle venture that winter?

A. Yes sir; I would hear.

Q. Along about that time your mind is impressed with his condition at that time, isn't it?

A. Yes sir; to some extent.

Q. Just before he took to his bed?

A. Yes sir.

Q. Now, between those periods was the times when you had come to St. Joe with him?

A. Yes sir; all along.

121 Q. And the times when you and he had bought cattle on the Yards at the same time. Now, you remember of his building a corn crib the fall before he died?

A. I remember that he had a crib of corn that he was buying.

Q. A new crib built that fall?

A. Yes sir.

Q. Did you see him working in it?

A. I have saw him around the crib.

Q. Did you see him working on it when it was in process of construction?

A. I couldn't say that I did.

Q. Did you see anybody else working on it?

A. Yes sir; I saw two men working there.

Q. Setting poles you mean?

A. Well, working on the crib.

Q. Setting poles for the crib?

A. Well, I didn't—yes, I guess. I know they were building the crib.

Q. Don't you know that Mr. Roloson with the exception of the setting of the poles built the whole crib himself?

A. No sir; I don't know whether he did or not.

Q. Now, during this interval—His wife died in October, 1899. Do you remember now whether that is right?

A. No sir; I couldn't tell whether it was right or not.
Q. It was about that time, October 1899?
A. It sound all right.
Q. October 1899?
A. Yes sir.

Q. During that fall and winter after she died, you observed
122 him in feeble condition, did you?

A. Yes sir.

Q. Now, do you have any distinct recollection of its being impressed on your mind that he was feeble during the following summer and on up then until the time just shortly before he died. Have you any distinct recollection now of noticing that he was in any unusual condition?

A. No worse than he was about the time his wife died.
Q. Or any different than he was?
A. I said I didn't notice any big change.
Q. Don't you know he brightened up after that?
A. No sir; I don't.
Q. You wouldn't say he didn't get in better health? Would you say that?
A. No sir.
Q. Do you know Austin Craig? who testified?
A. Yes sir.
Q. You may state to the jury whether or not shortly after the death of Eber B. Roloson you had a conversation with Mr. Craig or heard a conversation in which Mr. Craig stated that he had told——

Mr. KERR: I object to even the question being completed on the *the* ground that it is not cross examination of this witness and it is immaterial what conversation he may have heard at this time.

The COURT: It is not proper on cross examination.

Mr. RANDOLPH: I want to ask it to contradict Mr. Craig.

The COURT: Then you will have to recall Mr. Craig. The objection is sustained.

123 Redirect examination by Mr. KERR:

Q. You said you saw two men working on this corn crib?
A. Yes sir.
Q. Can you tell us their names?
A. No sir; I couldn't say. I was not really close enough to tell.
Q. What was the stage of the building when you saw these two men working there?
A. You mean how far along? Well, there was quite a bit of corn in it and possibly they was making it—Well, I wouldn't say whether they was setting more posts or going on with the work, putting more boards on it. They was just working around there. I didn't notice them particularly.

GEORGE PRICE called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. KERR:

Q. Where do you live, Mr. Price?
A. In De Kalb county.
Q. In what direction from weatherby?
A. About six miles west.
Q. Your occupation?
A. I live on a farm?
Q. How long have you lived in that county?
A. In De Kalb county?
Q. Yes sir.
A. Since 1854.
Q. How long before his death did you know Mr. Eber Roloson?
124 A. I was never acquainted with Mr. Roloson until in April 1902.
Q. Had you seen him prior to that time?
A. Possibly I had, but I didn't know it was him.
Q. From that time until the time of his death how frequently did you see him?
A. Well, I could hardly say. Possibly I would see him once in a week, and then maybe it would be two or three weeks before I would see him again.
Q. Did you see him in Weatherby during that time?
A. Yes sir; that is the only place I seen him.

Mr. RANDOLPH: If the court please, we object to any testimony by this witness as to Mr. Roloson's condition, because his testimony relates to a time later than the issue of the policy.

Q. Did you after April 1902 have any talk with Mr. Roloson about his health?
A. During—yes, during—after April of 1902 I spoke to him.
Q. Where did this talk take place?

Mr. RANDOLPH: We insist upon the time being fixed.
Mr. KERR: I am doing the best I can. You said at Weatherby?
A. Yes sir.
Q. Can you tell when any more definitely than you have already stated?
A. Only during the summer or fall of 1902.

Mr. RANDOLPH: Then we object to any statement as being after the policy was issued.
The COURT: Objection overruled.
To which ruling of the court the plaintiffs at the time excepted.

Q. What did he say to you at that time concerning his health?
125 A. Well, I would meet him and in conversation ask how his health was and he would say he was not very strong—I

couldn't say just the words he would make use of except not very well.

Q. Do you know where he lived exactly?

A. Yes sir.

Q. Did you have occasion to be near where his house was?

A. I had a sister that lived next door east from the house he lived in and was there quite often.

Q. Will you please describe to the jury in your own way how Mr. Roloson looked during the time that you did know him?

A. Well, he was a man that was thin in flesh; I couldn't say that he was—he was sallow; he was not red faced man; a man thin in flesh; looked very light, very light for a man of his height.

Q. Describe his physical condition as well as you can in your own way please?

A. Well, I could only say he was a man that looked thin; didn't look to be a healthy man; was light.

Q. How did he look?

A. He was very poor; didn't appear to have any flesh on him; but very little.

Q. What, if anything else, was there about his appearance that led you to think he was not healthy?

A. Well, he was a man somewhat stooped; walked with a cane; said he wasn't strong; told me frequently he wasn't very well.

Q. Did he ever tell you what was the matter with him?

A. Never did in his life.

Q. Did you ever hear him cough?

A. I couldn't say that I did, that I can remember of.

Q. When was the last time you saw him?

126 A. I couldn't tell you, but it was in the fall of 1902, probably about November, if I remember right.

Q. What was his physical condition then as compared with his physical condition when you met him first in April 1902?

A. Well, I believe he was—I would rather judge from his appearance he was not so strong; more weak; gradually growed weaker.

Q. Have any of your family ever had consumption?

Mr. RANDOLPH: We object, if the court please, as to whether the witness' family has consumption.

The COURT: I don't see what that has to do with it.

Mr. KERR: My purpose was to show whether this man was acquainted with the physical appearance of consumptives and how those physical conditions of consumptives compared with the physical condition of this man.

The COURT: The objection is sustained, and anything else in answer to the same kind of questions.

To which ruling of the court the defendant at the time excepted.

Cross-examination by Mr. RANDOLPH:

Q. You live two miles north of Maysville?

A. Yes sir.

Q. On a farm?

A. Yes sir.

Q. You are in Maysville most of the time?
A. Quite often.
Q. Every day?
A. Not every day.
Q. You won't miss it more than three days out of the year?
A. Yes sir, more than that.
127 Q. You are there 340 days in the year?
A. I couldn't say; I don't keep count of the days I go to town.
Q. Now, you went to Weatherby once in a while to see your sister?
A. Yes sir, I did.
Q. How did you go over when you went to Weatherby?
A. Ordinarily I took a buggy and drove; sometimes went on the train.
Q. How long did you stay when you went?
A. Sometimes a few hours, and sometimes only a short time.
Q. You had no previous acquaintance with Eber Roloson previous to April 1902?
A. Not at all.
Q. What is your sister's name?
A. Rachel Windmill.
Q. And during those short visits you once and a while met Mr. Roloson?
A. I met him quite often.
Q. He was about town?
A. Sometimes be down in town and sometimes down at his place, and sometimes met him on the streets.
Q. Did you ever see him working around?
A. I did not.
Q. Did you ever see him weighing corn, taking weights?
A. I never saw him weighing a load of corn I know of.
Q. Did you see him weighing cotton seed meal?
A. No.
Q. Did you see him loading cars?
A. I never saw him loading cars that I know of.
Q. You never saw him hauling it out north to do feeding?
128 A. No sir, I didn't.
Q. You went over generally Sundays?
A. I don't think I was there over Sundays.
Q. Did you ever go over in the week?
A. I didn't say so.
Q. Well, how often?
A. Sometimes once a week; sometimes three or four weeks.
Q. Did you see him a dozen times between April 1902 and November 1902?
A. I didn't see him nary time after November.
Q. But you say you saw him between April and November of that year?
A. Yes sir.
Q. Now, is it definite in your mind that he walked with a cane?
A. Yes sir; he did. I walked up the street with him.

Q. You are sure he walked with a cane?
A. I am.
Q. He carried a cane in his hand?
A. Yes sir; he did.
Q. That is all you know about it, what you have said?
A. Yes sir.
Q. He was a thin spare man?
A. Yes sir.
Q. That is the most you want to say about it, that he was a thin spare man?
A. Yes sir; he was a very thin man.

129 ALBERT WIGLESWORTH was next sworn as a witness in behalf of defendants, and testified as follows:

Direct examination.

By Mr. KERR:

Q. Where do you live?
A. Daviess County.
Q. How far from Weatherby?
A. Three miles east.
Q. How long have you lived there?
A. About 34 years.
Q. Your occupation?
A. Farming.
Q. Did you know Eber Roloson?
A. Yes sir.
Q. When did you first become acquainted — him?
A. Wel-, after we moved to Weatherby there.
Q. That was how many years ago would you say?
A. It would be about 8 or 10 years ago.
Q. How frequently did you see him during the last five or six years of his life?
A. Once or twice a week.
Q. Where would you see him?
A. Weatherby.
Q. What was his physical condition during that time? State in your own words to the jury how he looked.
A. Why, he was a sickly looking man to me.
Q. What was there about him that makes you say he was a sickly looking man? Tel- it all.
A. He lo-ked t-in, and had a kind of cough.
Q. Anything else?
A. That is about all.
130 Q. How would he cough?
A. Kind of a dry cough.
Q. What if anyt-ing, would he do when he coughed?
A. He most generally put his hand upon his breast when he coughed.
Q. Can you describe this cough any more in detail than you have?
A. No sir.

Q. What would you say was the relative condition of his health between the beginning of the year 1900, and the last time you saw him.

A. Why, the last time I seen him he seem-d to be weaker.

Q. When was this last time?

A. It was about, I don't know the month; maybe along there before he got down.

Q. Do you remember what season of the year?

A. It was in the Fall, in the winter like, along towards spring.

Q. He died in February, 1903?

A. Yes sir.

Q. With relation to that date, when would you say was the last time you saw him.

A. Probably a month or six weeks.

Q. Do you remember the occasion of his wife's death?

A. Yes sir, I remember when she died; not the exact date.

Q. Do you remember whether or not he had any sickness right after that? to your knowledge.

A. Yes sir. Seemed to me he was sick right after his wife, not long after.

Q. This talk you had with him, did he tell you he was sick then?

A. No, I never had no talk with him.

Cross-examination by Mr. RANDOLPH:

Q. You were raised over in Daviess County, by Alta Vista?

131 A. Yes sir.

Q. You never met Mr. Roloson at all, until he moved to Weatherby?

A. I have seen him before then.

Q. He was always a thin, spare man?

A. Yes sir.

Q. Now do you mean to say that he was a sick looking man? Or simply delicate looking man?

A. He looked sickly to me.

Q. What is in your mind, the difference between sickly and delicate?

A. Wel-, his cough.

Q. Are you right sure that cough*t* was continuous, or was it just at the time right after his wife died, when he had that sick spell?

A. Seemed to be worse then.

Q. That was in October, 1899? And since then you hadn't particularly observed any cough had you?

A. Yes sir, seemed to have it.

Q. Once in a while you would notice him coughing?

A. Yes sir.

Q. You had no special acquaintance with him?

A. No.

Q. You just simply saw him as a farmer who came to town once in a while, and saw him on the street?

A. Yes sir.

Q. How big is the town of Weatherby?

A. I don't know.
Q. Four or 500 is it?
A. Somewhere about like that.
Q. And Mr. Roloson was surrounded with neighbors there wasn't he?
A. Yes sir.
132 Q. Now did you stop and talk with him once in a while?
A. No sir.
Q. You were not any special acquaintance?
A. No sir.
Q. You just simply saw him once in a while when you came to town?
A. Saw him once in a while.
Q. Your idea of a healthy person is a large fleshy person?
A. Yes sir.
Q. Your father weighed about 300 pounds.
A. 265.
Q. Your mother was a large, fleshy healthy woman?
A. Yes sir.
Q. And your brothers and sisters—you are not the largest of the family, or even up to the average are you?
A. One among them.
Q. There are several fleshier than you are?
A. Yes sir.
Q. You are a large fleshy family, and accustomed to people that are large and fleshy, and a thin person looks sickly to you?
A. No, not all of them.
Q. But generally you think that a person that is fleshy has a more healthy appearance than a thin person?
A. No, some of them ain't.
Q. Now do you know Mr. Fitch here?—was Mr. Roloson a man about the same flesh as Mr. Fitch?
A. Hardly so——
Q. About the same amount of flesh on him wasn't there?
A. No.
Q. He didn't change much in flesh during the 10 years?
A. He seemed to me like he was kind of gradually losing flesh.
133 Q. That was right at the last?
A. The last 2, or 3 or 4 years.
Q. You thought he got thinner?
A. Yes sir.
Q. Well, he was a thin man to start with?
A. Yes sir.
Q. How about his color, was it white, pale?
A. Kind of a dark complected man.
Q. What was the color of his hair?
A. Kind of reddish brown?
Q. He was not much grey was he?
A. No, not very much.
Q. What was the color of his mustache?

A. Kind of red, a few grey hairs in it.
Q. Have any grey hairs in his head?
A. Yes sir.
Q. Very much?
A. Yes sir, had a good many.
Q. He was not as grey as I am?
A. No.
Q. And he was not an old looking man in the face was he?
A. Not so overly.
Q. He didn't hardly look his age in the face?
A. No.
Q. Did you know Mr. Roloson's standing in the community there?

Mr. KERR: We object to that as incompetent, irrelevant and immaterial, and not cross examination.

The COURT: If it goes to his standing, as a man of integrity or anything of that kind, it is wholly immaterial.

134 Mr. RANDOLPH: We want to ask as to his standing as to a man of integrity.

The COURT: The objection is sustained.

Mr. RANDOLPH: They have alledged that he had been guilty of frauds, and we want to show that he was not a man that would do such things; that he was a man of excellent character.

The COURT: You certainly can not do it on cross examination of their witnesses.

Mr. LAIRD was next called as a witness on behalf of defendants, and being duly sworn, testified as follows:

Direct examination by Mr. KERR:

Q. Your name is Fred V. Laird?
A. Yes sir.
Q. Where do you live?
A. In Weatherby.
Q. How long have you lived there?
A. About 12 years.
Q. Your occupation?
A. Restaurant keeper.
Q. Did you know Eber Roloson?
A. Yes sir.
Q. How long before his death were you acquainted with him?
A. About 5 or 6 years.
Q. Where was he living during that time?
A. Weatherby.
Q. Do you remember the occasion of his wife's death?
A. No sir.
Q. Was it after that that you became acquainted with him?
135 A. No sir.
Q. Before?
A. Yes sir.
Q. Do you of your own knowledge, know of his having any sickness?

A. Yes sir.
Q. Can you fix the time when this sickness took place?
A. I think it was after his wife's death.
Q. You think after his wife's death?
A. Yes sir.
Q. What makes you think that? I am trying to get at the date?
A. Well, she was dead.
Q. Do you know how long after?
A. No, I don't.
Q. Can you state the period of the year?
A. No sir, I can't.
Q. You don't know what season it was?
A. No.
Q. What did you know of your own knowledge, about his sickness at that time?
A. Well, he was sick; I waited on him a couple or three nights.
Q. Where was he during this sickness?
A. He was at home.
Q. You acted as nurse for him?
A. Yes sir.
Q. For how long a time?
A. Two or three nights.
Q. Can you say whether this was in the summer?
A. No, I can't.
Q. Or winter?
A. No sir, I could not.
Q. What was the matter with him at that time?
136 A. I don't know.
Q. What was his appearance and condition?
A. He was just sick in bed.
Q. How sick?
A. I guess pretty sick.
Q. Can you describe his condition any more than that?
A. No sir.
Q. Was he very weak?
A. Yes, he was sick.
Q. Had he been sick for some time before you became nurse to him?
A. No, I don't believe he had.
Q. How long after you ceased to nurse him was it before you saw him again?
A. Well, I don't remember.
Q. Do you remember how long his sickness lasted?
A. No sir.
Q. Can you tell the jury just any thing more about the nature of that sickness or its severity?
A. No sir I can't—never paid any attention to it.
Q. And you can't fix the year?
A. No sir.
Q. Was he able to be up and around, or confined to his bed?
A. He was in bed.

Q. Was he able to get out of bed without assistance?
A. No sir, he was not.
Q. Did he have a cough?
A. I don't remember whether he did or not.
Q. You still live there?
A. Yes sir.

137 Cross-examination by Mr. RANDOLPH:

Q. Did Dr. J. W. Baker attend him at that time?
A. No sir, I don't think he did.
Q. Who was attending him?
A. Some fellow from McFall.
Q. Dr. Patton, from McFall?
Q. Yes sir. They said it was him, I never seen him.
Q. You didn't see the doctor?
A. No sir.
Q. You couldn't identify him?
A. No sir.
Q. It was Dr. Patton of McFall?
A. Yes sir, I think that was——
Q. Were they both there—there are two doctors Patton?
Mr. KERR: Did you see the man yourself?
The WITNESS: No sir.
Q. When was this sickness; how long before he died?
A. Three years, I guess.
Q. Three or four years?
A. Yes sir.
Q. A temporary sickness was it?
A. I suppose it was, yes.

Mr. KERR: I move to strike out the evidence of this witness as to who was the medical attendant upon the ground that he did not have the knowledge of the identity of the doctor.

The COURT: The motion is granted. Can probably be shown by somebody who does know.

RILEY CLARK, was next sworn as a witness on behalf of defendants and testified as follows:

138 Direct examination by Mr. KERR:

Q. What is your occupation?
A. Farmer.
Q. Where do you live?
A. Eight miles northeast of Maysville?
Q. How long have you lived there?
A. 50 years, ever since I was a smal- boy.
Q. How long were you acquainted with Eber Roloson?
A. Well, for about 20 years.
Q. How frequently would you see him during the last years of his life?
A. Probably once a month, or six weeks; the last half year.

Q. What was his physical appearance, and condition during the last 4 years of his life?
A. He was a weak looking man; very thin in flesh.
Q. Can you describe his condition any more in detail?
A. Well, I don't know that I can, no more than he was just a very thin, uncommon thin, I thought him an uncommon thin, weak looking man.
Q. What was his condition immediately before his last sickness, as compared with his physical condition three or four years before?
A. Well, a short time before his death, probably three months, I noticed quite a change, but up until that time I hadn't notice- any change.
Q. What was this change?
A. He seemed to be very feeble.
Q. That is, some few months before his last illness you noticed that he had been growing perceptibly weaker?
A. Yes sir, a short time, three or four months, but up to that time I hadn't noticed it.
Q. Three or four months before his last illness, do you
139 know the date of his last illness?
A. No, not exactly.
Q. Well, with reference to seasons, can you fix the time when you noticed he was growing weaker?
A. Yes sir, along late in the Fall.
Q. Of the year 1902?
A. Yes sir, my recollection was he died in February, and it was some three or four months before

Cross-examination by Mr. RANDOLPH:

Q. Judge Clark, with the exceptions you have stated, during the 20 years you have known him, you did not notice much difference in him?
A. Not with the exception of the last.
Q. Until that sickness that Fall and winter?
A. Yes, sir.
Q. ——

BEN PERRY, was the next witness called as a witness on behalf of defendants, and being duly sworn, testified as follows:

Direct examination by Mr. KERR:

Q. Where do you live?
A. Gentry County.
Q. Your occupation?
A. Well, I farm mostly, ship stock.
Q. Did you know Eber Roloson?
A. Yes sir.
Q. How long did you know him?
140 A. Oh, I don't remember exactly, any where from 25 to 30 years I reckon.

Q. Did you have business relations with him during the last few years of his life?

A. No sir.

Q. Did you and he ship any stock together?

A. Yes, we shipped away back, shipped in '83, along there, 7 or 8 years, but the last few years he moved one way and I stayed where I was.

Q. Did you see him during the last few years of his life?

A. Oh, yes.

Q. Frequently?

A. No, not very frequently.

A. How often?

A. Oh, probably once in six months; I don't remember now, that would be pretty hard to say.

Q. What was his physical condition during the last few years of his life?

A. Well, I hardly know. There was a sale up there, and I thought he looked bad that day.

Q. What sale is this?

A. Mrs. Norton had a sale, the widow Norton.

Q. Were you in the ro-m yesterday, did you hear Mrs. Matthews testify?

A. No sir.

Q. Was it a sale at which he was auctioneer that you refer to ?

A. Yes sir.

Q. Did you talk with Mr. Roloson that day?

A. I said a few words to him, and shook hands with him?

Q. What did he say at that time about his health?

A. Didn't say much. I just asked him how he was getting
141 along. Oh, he says, I guess I am getting along very well.

Q. After that time did you see him.

A. I think I saw him once or twice.

Q. What did you say as to his being weak or strong during the last 4 or 5 years of his life?

A. I don't know. A time or two I saw him I thought he was failing some; that he was not very strong, no time. He was a withy fellow and never what I would call a robust, stout man, but he was pretty withy for his size; when we shipped stock back yonder he was what I counted a very withy man.

Q. Contrast his condition during the year 1900 with his condition the year before he died.

A. Towards the last I didn't think he was hardly as stout as when we was in together. He didn't look, I didn't think, quite as well.

Q. Was there any thing more to your ideas that that failing which comes with age?

A. Well, I don't know but what there was a little.

Q. Tell us what there was.

A. Just looked like he was going down a little, more than a man would with natural age.

Q. Did you have any talk with him concerning his physical condition?

—. ——

Q. How long before his death, did his health begin to fail, noticeably to you?

A. Oh, I don't hardly know exactly. I saw him at that sale, and saw him afterwards, and then I thought he was better. The next time I saw him that he was in better shape than the day of the sale.

Q. Then did you see him after that?

A. I don't remember whether I ever did or not.

Q. Can you fix the date of this sale?

142 A. No sir, I could not.

Q. Can you fix the year of it?

A. No sir, I could not. I don't know as I could fix the year.

Q. Did he give you any reason for his not getting out of his buggy the day of the sale?

A. No sir, he just drove up there, didn't say why, or any thing of the kind, just didn't get out.

Q. How long did he remain at the sale?

A. I don't know exactly how long he remained there. I don't think he stayed a great while, though.

Cross-examination by Mr. RANDOLPH:

Q. What part of De Kalb county did you live in.

A. Don't live in De Kalb county at all; live in Gentry county.

Q. How far from the Gentry county line?

A. I think it is four miles and three quarters on a direct line.

Q. North of the line?

A. I live north of the line.

Q. How far did you live from Mr. Rolos-n when he was on his farm?

A. Well, it was right at six miles.

Q. When you and he were shipping cattle, and handling stock together, you were shipping from McFal- were you?

A. Yes sir, and other places.

Q. And you saw a great deal of Mr. Roloson at that time?

A. Yes sir.

Q. And was he able to undergo the fatigue necessary to attend to business?

A. Yes sir. He would go to the cattle—I always considered I was the best buyer, and he would go to the cattle and look after them.

Q. Drove them, and was up nights with them?

143 A. Yes sir, took care of as many cattle as any man I ever seen.

Q. You quit that business when—quit shipping.

A. Well, I don't remember what year, but it has been several years ago; probably 15 years.

Q. Now he was always a thin, rather delicate looking man?

A. Yes.

Q. And his endurance and strength were surprising for his looks?

A. Yes sir, they were awful good for his looks; he was what I called a withy man.

Q. After he moved to Weatherby you just saw him once in a while?

A. Yes sir.

Q. Mrs. Norton had three sales that Fall, didn't she?

A. I don't know whether she did or not.

Q. That Fall, early and late together, had three sales?

A. That was at one of them. My wife was with me at the time I speak about, and Mr. Roloson had come there to try and buy the corn.

Q. Now that involved a drive of 20 miles to get up there?

A. Oh, no, not that far, about 15 or 16 I guess.

Q. That was up in Gentry county?

A. Yes sir, from the Gentry cou-ty line, about three miles north.

Q. And he lived down there in the central part of De Kalb?

A. Lived at Weatherby.

Q. East of the central part, pretty near due east of Maysvi-e, about 8 miles?

A. Yes sir.

Q. Prior to that time, had you noticed he was in any materially different condition than he had always been?

A. No, I couldn't say that he was.

Q. But that day you noticed he didn't look very well?

144 Q. But you saw him after that and he looked better?

A. I thought he looked a little better, me and my wife talked about it. My wife was with me the day at Norton's sale; he had been with me a great deal and she went down and shook hands with him too.

Q. After that sale, did you see him any more until he died; after that time I mean when you say he was looking better?

A. I might, but I don't remember of seeing him—I saw him at McFall I think.

Q. Now that sale, that was a rainy disagreeable day wasn't it?

A. Yes sir, it was a kind of a damp day.

Q. The sale was held out of doors?

A. Yes.

Q. And his buggy afford- him shelter, if he remained in the buggy?

A. Yes sir.

Q. He had a top buggy didn't he?

A. I couldn't say, I reckon he had—generally went that way, in a top buggy.

Q. Did Mr. Roloson, up until the time of his death, carry on a large business?

A. Considerable, yes.

Q. A heavy feeder, was he?

A. Yes, considerable feeder.

Q. And he was a man who gave close attention to his business?

A. Always looked after his business close.

Q. Was he lively and active about it?

A. Yes sir.

Q. A man who got up early in the morning?

A. Yes sir.
Q. Moved around about his business during the day?
A. Yes sir.
145 Q. Stayed up nights when it was necessary did he?
A. Yes sir.

Redirect examination by Mr. KERR:

Q. Do you remember the occasion of Mrs. Roloson's death?
A. Wel-, they lived about 15 miles from me, I remember when she died, that is, heard of it, that is all.
Q. Can you fix the time of that—it was the year '99, what have you to say as to his condition after that time as compared with before?
A. After that time I thought he didn't look well as before. I thought he was grieving over the death of his wife. He was a man I always thought, thought a great deal of his wife.
Q. He was a particular friend of yours?
A. Yes.
Q. He never looked the same to you after his wife's death as before?
A. Didn't look quite as stout.

Mr. WOOD, was next called as a witness on behalf of defendants, and being duly sworn testified as follows:

Direct examination by Mr. KERR:

Q. Where do you live?
A. Six miles and a half north east of Maysvil-e, De Kalb county.
Q. Your occupation?
A. Farmer.
Q. How long were you acquainted with Eber Roloson?
A. Well, I hardly know how long.
Q. It is so far back, is that what you mean?
A. I had seen him off and on for probably 30 years back.
Q. Did you see him during the last few years of his life?
146 A. Well, only once in a while.
Q. Where used you to meet him, and see him.
A. Saw him once in a while at Weatherby, and saw him once at the stock yards, St. Joseph Stock Yards.
Q. Will you describe in your own way, as well as you can, how he looked during the last four or five years of his life?
A. He looked thin and poor; of course kind of pale.
Q. Go ahead, any thing more?
A. That is about all I could say as to the way he lo-ked: thin, and po-r, and pale.
Q. Did he seem to you to be a strong man, or otherwise?

Mr. RANDOLPH: We object if the Court please; we think it is a question of disease entirely.
The COURT: The objection is overruled. Plaintiff excepted.

Q. Did he appear to you to be a strong man, or otherwise?

A. He didn't appear to be a strong man to me.
Q. What was there about him that made you think he was not?
A. His looks; looking pale, and thin.
Q. Describe what he looked like to you, so the jury can, as near as possible, see what you saw?
A. I don't know but what I have described it as well as I can.
Q. Did you notice him walk much?
A. Well, not a great deal, no.
Q. You can't tell us any more in detail than that, Mr. Wood?
A. Not about the looks of the man.
Q. Can you tell us any more about his physical appearance, his condition, or health?
A. Well of course he looked pale, as I said before, and thin; he was a man that didn't have much flesh on him.
147 Q. How about his blood?
A. Well, he looked pale.
Q. Do you remember the occasion of his wife's death?
A. I just remember hearing of it.
Q. What would you say was the relative condition of his health after that as time went on?
A. I don't know that I can say any thing in that respect. I don't know that I ever saw the man but one time after his wife died, to my recollection.

Cross-examination by Mr. RANDOLPH:

Q. When was it you were in St. Joseph, buying stock with him at the stock yards?
A. I believe it was about September, '92, if I am not mistaken.
Q. 1902?
A. 1902.
Q. He was on the yards like any other man?
A. Yes sir.
Q. Did his work like any other man?
A. Yes sir.

Redirect examination by Mr. KERR:

Q. You say you saw him in November, 1902?
A. No, I believe it was in September; I won't be positive as to the month, but it was in the Fall.
Q. That is, just a few months before he died; is that the time you mean?
A. Yes sir.
Q. Who else was with you?
A. Not any body. I met him at the stock yards and talked with him oh, probably 25 or 30 minutes. Stock yards at St. Joseph.

148 JOHN WARD, was next called as a witness on behalf of defendants, and being duly sworn, testified as follows:

Direct examination by Mr. KERR:
Q. Where do you live Mr. Ward?

A. I live north of Weatherby, in De Kalb County.
Q. How long have you lived there?
A. About 35 years.
Q. How long were you acquainted with Eber Roloson?
A. Well, between 35 and 30 years I think.
Q. What has been your occupation?
A. Farmer.
Q. Did you see Mr. Roloson frequently during the last few years of his life?
A. Why yes sir, I seem him every once in a while.
Q. You and he lived in the same place didn't you, not very far apart?
A. Not a great ways, between 6 and 7 miles.
Q. Do you remerber the time — Mrs. Roloson's death?
A. I remember of it, but I dodn't remember dates.
Q. You remember in a general way of the time of her death.
A. Yes sir, I remember when she died, remember hearing of it.
Q. In general, what was the physical appearance, and condition of Mr. Roloson, during the last few years of his life? Tell it in your own words as it seemed to you?
A. Well, he didn't look like a stout man to me.
Q. Did he look like a sick man, or like a well man to you?
A. He looked like he was not healthy.
Q. What was it about him that made you think that explicitly? Please tell the jury the little things that led you to that conclusion?
A. He looked rather pale and sallow, and he was thin. He
149 was always a thin man though from the time I knowed him, but he looked rather pale and sallow.
Q. He was always a thin man?
A. Yes sir.
Q. Now was there any thing besides his being thin that led you to think he was unhealthy during the last few years of his life?
A. Well, I thought he looked like he was losing flesh the last few years of his life; seemed to me he was looking rather weak; had that appearance.
Q. What would you say as to his health particularly after his wife's death? Did he remain in a constant condition of health, or did it vary?
A. Well, I thought that he looked like he was failing.
Q. Gradually growing weaker?
A. Yes sir. Had that appearance.

Mr. RANDOLPH: Mr. Kerr's question seems to be leading, and all his questions bear an insinuation of the answer desired.
The COURT: The last question was leading.

Cross-examination by Mr. RANDOLPH:

Q. You live about six miles north of Weatherby?
A. Between 6 and 7.
Q. And there is no direct road immediately north of Weatherby you have to drive a little further to make the trip.
A. Yes sir, it is between six and seven miles from Weatherby.

Q. To drive?
A. Yes sir, to make the road to Weatherby.
Q. When you first knew Mr. Roloson, he was living over in the McClure neighborhood?
150 A. Yes sir, he lived over in that neighborhood.
Q. That was in 1874 wasn't it?
A. Well, I don't remember dates, I expect that was about the time.
Q. He was a young man, and you were a young man at that time?
A. Yes sir.
Q. You had just married and moved up to that place?
A. In 1869.
Q. And a few years after that you met Mr. Roloson?
A. Yes sir.
Q. Were you ever with him when he was at work?
A. Never was.
Q. Didn't belong in your neighborhood?
A. No.
Q. Belonged out of your neighborhood, and you just knew him as a man that lived in another neighborhood, and that has been the extent practically, of your acquaintance with him at all times?
A. Yes sir.
Q. Is Weatherby your trading point?
A. No, I go there—used to be more so than now. I used to ship over there when I handled stock.
Q. You never bought and sold stock very extensively?
A. Not much, no.
Q. But you have been rather an extensive raiser of stock?
A. Yes sir, I have some.
Q. All you saw of Roloson then, was when you happened to meet him at Weatherby?
A. Yes sir, the last few years I met him there, or Maysville, or different places.
Q. About how frequently would you see him?
A. Probably would not see him over eight or ten times a year.
151 Q. You are not as stout yourself as you were ten years ago?
A. No sir.
Q. And Mr. Roloson, you didn't think was as strong when he was 54 as he had been when he was 30?
A. No.
Q. There is a natural tendency among men, ins't there, for the flesh of the face to shrink some, wrinkle down, as they approach that age, than when they are younger?
A. I suppose there is.
Q. And of course your not having been with Mr. Roloson, you don't know any thing about his powers of endurance, or his ability to labor?
A. No, know nothing about it.
Q. But just looking at him, you didn't think he was as stout as when you and he were both young men?

A. No, he looked like he was failing in health.
Q. Like he was not as strong as he used to be?
A. No, he was not as strong.
Q. Now immediately, or a short time after his wife died, do you know whether he had a period of great depression at that time?
A. I don't know much about it; I heard of it; heard he was sick.
Q. Did he have the appearance the few times you speak of having seen him, of being in a state of mental worry, a pre-occupied expression on his face?
A. I don't know but what he did. I believe he did.
Q. And along that winter before he died, do you know whether that expression had returned to his face again, of worry and pre-occupation, as though his mind was dwelling on some trouble?
A. Well, I don't know dates like that as I could fix, but he
152 did have that appearance at times, that he was worried about something.
Q. Now Roloson, was an active, go-ahead business man wasn't he?
A. Yes sir, I think he was.
Q. His dealings were large?
A. Yes sir, he handled stock on a large scale.

Redirect examination by Mr. KERR:

Q. We all know that a man as age comes on is not as strong as he was.

Objected to as suggestive.
The COURT: That objection is overruled this far: let us see what the question is.

Q. Do you mean to say to the jury that there was in the case of Mr. Roloson, any thing in which—any change in his health towards the last, than the change which commonly comes with age, or was there something beyond that?

Objected to, as cross examination.
The COURT: The objection is overruled.
A. Yes sir, I thought he was, had ill health, and had declined.

Recross-examination by Mr. RANDOLPH:

Q. Can you give any idea to this jury, of the number of times you saw Mr. Roloson, from the time his wife died until he himself passed away?
A. That would be hard to give an idea.
Q. Did you average once in four months?
A. Yes, I expect I seen him once a month.
Q. You think perhaps you saw him once a month on an average, but there were periods of four or five months that you did not see him.
A. Might have been, I don't know.
Q. Do you remember of seeing him shortly after his wife died?
A. Well, I don't remember, I probably seen him, but I
153 don't remember how long.
Q. Well, is the noting of an appearance of distress with

Mr. Roloson associated in your mind with the fact of his wife's death, and the time of his wife's death?

A. Well, I don't know. I hadn't thought of it in that way. I thought he had the appearance of a man who was in bad health, never thought what brought it on.

Q. You noticed that the Fall before he died?

A. It might have been his wife, I don't know.

Q. And might have been mental worry?

A. It might have been.

Q. Did you notice that the Fall before he died?

A. Yes sir, I had seen him.

Q. You more particularly remember him just the Fall before he died than at any other time?

A. I remember him before he died because I thought he looked bad.

Q. You remember him more particularly then, don't you?

A. Probably I did.

Noon recess was here taken.

After Recess.

Mr. RANDOLPH: If the Court please, I want to call Mr. Johnson for a moment's cross examination. I neglected to direct Mr. Johnson's attention to the opposite side of the paper that was signed by Dr. Brown, and I also want to identify that as Dr. Brown's handwriting.

The COURT: Go ahead.

Mr. JOHNSON was recalled, and testified further as follows:

Cross-examination by Mr. RANDOLPH:

154 Q. This is the same paper shown you only this is the opposite side. Look at that, and tell me whether or not that is Dr. Brown's handwriting, and whether or not that is his signature.

A. Yes sir, this is his signature.

Q. And is it his writing, part of it his handwriting, the written part of it?

A. I think it is.

Q. You don't see anything there except what you would say is his handwriting do you?

A. Why, I think it is, yes sir.

Mr. KERR: If your Honor please, in connection with the deposition given by Dr. Baker, read yesterday, I desire to offer in evidence, the examination to which the doctor referred and his report thereon, together with the letter which he said accompanied the same, and was sent to the office of the insurance company therewith. It is only the second page of the letter which refers to this matter.

Mr. HAYNES: The letter offered in evidence is objected to by plaintiffs, on the ground, first that it is not a part of the application, nor a part of the medical examiner's report; neither is it a matter in which the applicant, Eber B. Roloson, participated, or of which he

had any knowledge, nor is it a part of the exhibit attached to the deposition, nor does it come within the scope of section 7929 of the Revised Statutes of Missouri, 1899, by being attached to the policy, or endorsed thereon, or referred to therein, and forms no part of the contract of insurance.

Mr. KERR: The only offer was of the two together.

155 Mr. BROWN: I suppose the Court has apprehended the theory upon which the defendants offer it. Certain specific questions were asked of the witness by Mr. Haynes; that is, he was asked if he did not state on the written application to the Home, or the Fraternal Home Insurance Company, if he did not state certain things. The doctor said that he stated those things, as modified by a certain letter, written at the same time. The Fraternal Home application is not a part of this case, it has nothing to do with this case, but it was simply introduced for the purpose of affecting Dr. Baker's testimony. He was asked if he did not make those statements, and he said that he made them as modified by this letter, and he desired the letter to go in in connection with it.

The COURT: The theory upon which the application was offered in evidence I suppose by the plaintiffs, was to contradict the statements made by this witness in his deposition; in his examination to show that he had made the statements contrary to what he stated as a witness. That was the theory upon which his attention was called to his statement in report as I remember the deposition. That being the case, his entire declaration, or statement made at the time to the same person is admissable. I will receive the letter in evidence.

To which ruling of the Court Plaintiffs at the time excepted.

Said paper mentioned in evidence was handed to stenographer and by him marked "Exhibit "D," and said letters were marked Exhibit "E."

Mr. KERR: The examination which has been offered in evidence as Exhibit D, is the examiner's report referred to in the depo-

156 sition of Dr. Baker read yesterday.

Mr. RANDOLPH: While perhaps we have no right to direct the order of testimony, we think it would be fair to read this report here, if the letter is read to the jury at the same time.

The COURT: Read that part that was referred to directly by you as tending to impeach the doctor's testimony if you wish to.

Mr. RANDOLPH: We do not offer it.

The COURT: It is of no importance who does the reading.

Which said report and letter were read in evidence. The said report is in words and figures, as follows, to-wit:

Medical Examiner's Report.

(To be Filled Only by the Medical Examiner.)

1. Rate of pulse (while seated) 70. 2. Its character? Fair. 3. Age? 52. 4. Exact height? 5 feet 9 inches. 5. Exact weight? 137 pounds. 6. Girth of chest at fourth rib? 34 inches. 7. Girth of abdomen at waist? 32 inches. 8. How long have you known applicant? 7 yrs. 9. Complexion? Fair. 10. Color of hair? Brown.

11. Color of eyes? Blue. 12. Race? American. 13. Is applicant's general appearance healthy or unhealthy? —. 14. Is applicant deformed, lame or maimed? No. 15. Has applicant recently gained weight? No. 16. If so, how much and to what is it due? 17. Has applicant recently lost weight? No. 18. If so, how much and to what is it due? 19. Is applicant's build a family characteristic? Yes. 20. Are there any marks of smallpox or successful vaccination? Yes. 21. Do you find after careful enquiry and personal examination, any evidence of past or present disease? No. 22. Of brain or nervous system? No. 23. of the heart or lungs? No. 24. Of the stomach or abdominal organs? No. 25. Of rheumatism or gout? No. 26. Of the skin, middle ear, eyes, or any part of the body? No. 27. If so give full details? No. 28. Does chemical examination of applicant's urine show albumen or sugar (even in traces) or any abnormality? No. 29. State specific gravity and if it is below 1015 or above 1025, give your opinion as to the cause? —. 30. Has applicant ever had any genito-urinary ailment, sy-hilis, 157 stricture, etc? No. 31. if so, give full details?——

(NOTE—Examination of urine not required except in cases of suspected genito-urinary disease and in all cases where applicant is over 45 years of age.)

32. Have you any reason to suppose that applicant is now or ever has been intemperate in the use of alcohol or drugs? No.

If a Woman.

33. Number of children had, if any? —. 34. Age of those living? —. 35. Has she passed the climacteric? —. 36. Has she ever had any disease peculiar to her sex? —. 37. Have you reviewed all answers in this report and application and are you sure they are clear and complete? —.

(NOTE—Any erasures or alterations should be initiated by the Medical Examiner.

38. Do you believe that applicant has given full and true information in all respects? Yes. 39. Do you find applicant to be in good health in every way? Yes. 40. Do you recommend that a Benefit Certificate be issued? Yes.

I certify that I have examined E. B. Roloson of — at Weatherby Mo. this 1 day of May 1900; that I have carefully reviewed with applicant the accompanying application for a benefit certificate. That answers made to the Medical Examiner are in my handwriting and are exactly as made by applicant, and he signed them in my presence.

J. W. BAKER, M. D.

FOSTER E. ACKLEY,
Supreme Medical Director, Hamilton, Missouri.

Additional Remarks.....

Printed thereon is the following:

Instructions to Medical Examiners.

1. The Examiner must date his examination on the day it is made.
2. The especial attention of the Medical Examiner is called to the fact that benefit certificates issued by The Fraternal Home are Free From all Restrictions as to Travel, Residence, Occupation, Habits of Life or Manner of Death, and Death Benefits are Incontestable From Date of Issue. Therefore every endavor should be
158 made to make this report as complete and precise as possible, each answer being carefully weighed before the report leaves the Examiner's hands.
3. The examination of applicant should be conducted in private or as near so as circumstances will allow.
4. All questions must be answered fully and plainly and free from evasion.
5. Obtain as complete a family history of applicant as possible, elicit plain and specific answers to questions regarding age, present condition of health or cause of death.
6. Question No. 13 must be answered explicitly, showing what illnesses, diseases or accidents applicant has had since childhood.
7. All measurements required should be carefully and accurately taken, also if light or heavy weight; state whether either is characteristic of father or mother, or both.
8. Be particular to obtain the facts, concerning applicant's past and present habits as to his use of narcotic drugs or alcoholic stimulants.
9. The Examiner is requested to send direct to the home office in Hamilton, Missouri, [illegible]formation which for any reason he prefers not to embody in this report. Correspondence in reference to an applicant, is always considered strictly confidential.

FOSTER E. ACKLEY, M. D.,
Supreme Medical Director, Hamilton, Missouri.

The letter marked Exhibit "E" is dated at Weatherby, Mo. May 1, 1900, addressed "Foster E. Arckley M. D.," and the part thereof referring to this transaction, and read in evidence is in words and figures following:

In regard to the risk of Mr. E. B. Roloson. I do not think it a good risk altho he passes a very fair examination he is on the decline therefore not a good risk. I would have told him so but he
159 being a good patron of mine and he insisted on examination, I gave it him so as not to offend him. He has plenty of Insurance $11000.00 in Old line Co's.

Yours Fraternally in A. F. & A. M.,
J. W. BAKER, M. D.

160 Mr. GOLDEN WOLFE, was next called as a witness on behalf of defendants, and being duly sworn, testified as follows:

Direct examination by Mr. KERR:

Q. Your name is Golden Wolfe?
A. Yes sir.

Q. Where do you live?
A. In De Kalb county, Missouri.
Q. How far distant from Weatherby?
A. About 8 miles.
Q. How long have you lived there?
A. About 20 years.
Q. What is your occupation?
A. Farmer.
Q. How long did you know Eber Roloson?
A. 18 or 20 years.
Q. What was the extent of your acquaintance with him?
A. Well I just met him frequently, same as any other neighbor that lived close?
Q. Did you at any time live close to him?
A. I lived within about 3 miles, or a little less, of him.
Q. That was before he moved to Weatherby?
A. Yes sir.
Q. After he came to Weatherby, what did you see *fo* him?
A. I seen him frequently when I went to Weatherby, and then him going backward and forwards to his farm I would see him.
Q. Do you remember the occasion of Mrs. Roloson's death?
A. Well, I just knowed of it, didn't know much about it.

Q. It appears to have taken place in the year 1889, in the
161 fall of the year?
A. Something like that.

Q. What was the condition of Mr. Roloson's health, after that year, 1899, and until his death as compared with the condition of his health previously?
A. It seemed to me considerable worse.
Q. Will you explain to the jury what makes you give that answer. And just what you saw about his physical condition that led you to think so; tell it all in your own words.
A. Well, he appeared to be weaker, and more infirm, and kind of had a nervousness, kind of shaking to him, get him to talk and get him excited to any extent.
Q. Just repeat that a little louder.
A. He seemed to be weaker, and a little more nervous than he was before,—would not walk quite so fast as he commonly did.
Q. Did he seem to you to be a well man, or a sick man?
A. He seemed to be sick, I thought.
Q. Did it seem to you that the condition in which he was, was the one which ordinarily comes with age to men of his then age, or a condition induced by some other causes?
A. Well, it seemed to be from some other cause. Sometimes he appeared to be better than others; appeared to me so.
Q. Referring particularly to the last two years of his life, what have you to say?
A. I thought he was a little more nervous at times than before.
Q. Any thing else?
A. No, I don't know as——

Q. What about this nervousness which you mention during the last two years?

A. He seemed to be, talking to him, he would kind of
162 shake his jaw the head like.

Q. Any twitching that you *bo*served?

A. Seemed like a shake of the head like a palsy.

Q. And as to his strength or weakness?

A. At times he seemed like he was weaker; other times he was stronger.

Q. What was his color?

A. Rather pale.

Cross-examination by Mr. RANDOLPH:

Q. You haven't seen much of him since he moved to Weatherby have you Mr. Wolfe?

A. Well not so much.

Q. Is Weatherby your trading point?

A. Part of the time.

Q. How often do you go to Weatherby?

A. Oh I couldn't tell exactly how often.

Q. You are nearer to Santa Rosa, are you not than Weatherby?

A. Yes.

Q. And you go there oftener than to Weatherby.

A. Yes sir do now.

Q. And you are also nearer to Fairport than to Weatherby?

A. Yes sir.

Q. And you go there some to trade don't you?

A. Yes sir.

Q. And it is simply once in a while that you go to Weatherby?

A. Yes sir, frequently there, to mill, and used to do my banking business there.

Q. How long since you quit doing your banking business there?

A. Up to the time the bank was organized in Santa Rosa.

163 Q. That has been about 3 years.

A. Some 2 or 3 years I guess.

Q. Mr. Roloson you say, came by your place once in a while going to his farm?

A. Yes sir.

Q. Your place was on the road was it?

A. Yes sir.

Q. Did he stop?

A. Some times he would if I was out there.

Q. There was very little difference in his appearance the last time you saw him until his fatal sickness, and the first time you saw him except that he had grown older?

A. He seemed I thought weaker.

Q. Was there much difference when you walk up and look at him?

A. Not so much.

Q. But when you would get to talking with him, and he would get excited in talking you thought his head would shake?

A. Yes sir.
Q. You didn't notice it when he was not excited?
A. Not much no.
Q. He attended to his business right along didn't he?
A. I don't know about that. I never seen him pass up that way much lately.
Q. You mean the last 2 years?
A. Not up to his home so much, no.
Q. Was it because you were more busily engaged yourself?
A. I don't know.
Q. He might have gone by?
A. Might, yes.
Q. He didn't always stop did he?
164 A. No.
Q. The only times you saw him was when you happened to be down by the road?
A. Yes sir.
Q. Would he stop and talk with you?
A. Sometimes he would.
Q. And sometimes drove right on?
A. Yes.
Q. And he might have passed your house a great many times without your seeing him?
A. Oh, certainly.
Q. Is your house located the same place it was 2 years before he died?
A. Yes sir.
Q. And the road is at the same location from the house?
A. Yes sir.
Q. Did he ever go any other road?
A. I don't know about that.
Q. Wasn't there just as good a road a mile east of you?
A. Yes there is a road east of me.
Q. And it is a direct road from Weatherby?
A. It would be a little out of the way to go that way.
Q. The road west of you would be——
A. I think that would be out of the way too.
Q. Isn't he a mile west of you?
A. Three quarters west I guess.
Q. You thought he appeared not to be so strong as he had formerly been?
A. No sir.
Q. When you first knew him he was a hard working man?
165 A. No sir, I couldn't say he was.
Q. I don't mean out in the field, but he was continually busy?
A. He used to trade when I first known him, rode a good deal over the country.
Q. He was a man that got up early and kept moving?
A. Yes sir.
Q. And was what you would call an industrious man?
A. I think so.

Q. Now, the last 2 years of Mr. Roloson's life, he had a telephone at his house so he could talk to his farm?
A. Yes sir.
Q. And did not necessitate the frequent trips before he got a telephone.
A. No, that is right.
Q. Did you ever see him riding horseback?
A. Yes sir.
Q. How far is his farm on beyond you?
A. Three miles; about 11 or 12 miles to Weatherby.
Q. How long ago was it you saw him riding horseback up there?
A. I couldn't say—some 2 or 3 years before he died I think.
Q. And the other time you saw him riding in a buggy?
A. Going in a buggy.
Q. Was he usually alone?
A. Usually.

DAVID GROOMER was next called as a witness on behalf of defendants, and being duly sworn, testified as follows:

Direct examination by Mr. KERR:

Q. Your name is David S. Groomer?
A. Yes sir.
166 Q. Where do you live?
A. I live at Pattonsburg.
Q. How long have you lived there?
A. I moved there 2 years ago last June.
Q. What is your occupation?
A. Well my occupation is just working at first one thing and then another now.
Q. Where did you live before you moved to Pattonsburg?
A. Weatherby.
Q. How long did you live there?
A. I moved there in '94, in December.
Q. And stayed there until three years ago, and then you moved to Pattonsburg, and have been there since?
A. Yes sir.
Q. And your occupation has been the same through all this time?
A. No, while I was at Weatherby I was in the lumber business.
Q. Did you know Eber Roloson?
A. Yes sir.
Q. For how many years before his death?
A. I have known Eber Roloson, ever — '76, or '77, somewheres along there.
Q. Did you see much of him during the time he lived in Weatherby?
A. I saw him several times yes sir.
Q. You were running a lumber yard there?
A. Yes sir.
Q. Did he come around your place of business frequently?
A. Yes sir, tolerably often.

Q. Describe to the jury, the physical appearance and condition of Mr. Roloson, during the years 1901, 1900, as it seemed to you.

167 A. Well it seemed at that time like he looked very feeble, very frail.

Q. Do you remember the time of his wife's death in the Fall of 1899?

A. Yes sir, I remember when she died, but I don't know just the date.

Q. The date is not in dispute, you remember of it?

A. Yes sir.

Q. Do you remember, whether or not Mr. Roloson, was sick, very soon after that?

A. He was sick that fall after she died, or the winter following I don't know just — long after she had been dead until he was sick.

Q. How long was he sick then?

A. I don't know.

Q. After that, what was his health?

A. Well, his health seemed after he got up and around, something like it was before he was sick.

Q. Was he a well man, or a sick man, as it seemed to you?

A. Well, he was able to go most all the time. He was a very energetic fellow, and he looked sometimes like he would better been sitting around the fire as to being out trying to attend to business.

Q. Was that a usual, or unusual appearance?

A. Well at that time it was his usual appearance to me.

Q. What was the condition of his eyes?

Mr. RANDOLPH: We object, there is no question about his eyes.

Mr. KERR: I am not calling attention to blindness.

The COURT: The objection is overruled.

Q. Did you notice any thing about his eyes?

A. He generally wore his specks.

Q. Any thing else?

A. And when he would come in if it was very cold, the

168 water would be running out of his eyes, and he would wipe his eyes with his hand that way. (Indicating.)

Q. Was that only when the weather was cold?

A. I didn't pay much attention to it; only I didn't notice it so often, I got so used to him being around I didn't pay much attention to him.

Q. You are not able to say whether he had a chronic condition of watery eyes or not.

A. No, I am no doctor.

Q. Did he, or did he not cough frequently?

A. Once in a while he would cough a little.

Q. What sort of a cough?

A. Well, he would not cough very loud; very low, kind of a hacking cough.

Q. The sort of a cough that a person has when they have a bad cold or another kind?

A. Oh, I don't know, it was not much of a cough. Sometimes he would complain of a hurting through here (indicating).

Q. Would put his hand up around the top of his chest when he coughed, and say it hurt him there?

A. Yes sir.

Q. Did you ever talk to him about his health during the years 1900 and 1901.

A. Well, a right smart, we talked about his health some, yes.

Q. What if any thing did he say to you about his health at that time?

A. I don't know of any thing particular, only sometimes he would talk about his business affairs, and say he didn't feel able to go and see about it.

Q. Did he call attention in any of those conversations, to any particular condition of his own body?

169 A. No.

Q. What would you say as to the condition of his health during the year 1899, as compared with the condition of his health in the year 1902? Was it the same the latter year, or had it changed?

A. Well, I think he had grown much weaker, in 1902, than he was in 1900.

Q. You are speaking of 1899, and 1902?

A. Yes sir.

Q. Do you mean you saw a greater weakness than would ordinarily come with the increased age of 3 years, or otherwise?

A. No, I don't know as I did.

Cross-examination by Mr. RANDOLPH:

Q. When you first became acquainted with Eber Roloson, you lived close by him, did you not?

A. No I lived in Daviess county when I first became acquainted with him, and then in 1881, or '82, I bought land adjoining land to Mr. Roloson, and lived neighbor to him till '94.

Q. You lived neighbor to him then for 13 or 14 years?

A. Yes sir.

Q. And his general appearance was always slender and thin wasn't it?

A. Yes sir.

Q. He always remained in about the same condition of flesh?

A. Yes sir, it seemed like he was something near the same weight all the time.

Q. Now that thin condition was a characteristic of his family was it not?

A. Yes, there is none of them heavy.

Q. Did you know his father?

A. Yes sir.

170 Q. Was he heavy?

A. No sir.

Q. Did you know his mother?

A. Yes sir.

Q. Was she heavy?

A. No sir, she was not a large woman.

Q. They lived not far from you also, his father and mother?
A. Yes sir.
Q. Now how was he as to activity? Was he an active man, and a man who was active in going around and attending to his business?
A. Yes sir, until in late years. I didn't see him going around so much in late years, because I lived in town, and didn't see him going so much.
Q. He had retired to some extent from active life?
A. Yes sir.
Q. At the time he moved to Weatherby, when his wife was sick—now you know when his wife was sick, that he nursed her himself, and gave her his own personal attention?
A. Yes sir. He was a great man for his woman. The neighbors of course helped him some.
Q. But he took the principle care of her?
A. I don't know, I was not there.
Q. You know that during that time he was very much devoted to her?
A. Oh yes.
Q. What was the color of his hair.
A. His hair was something the color of Mr. Fitche's there.
Q. Kind of a light brown, showed very little grey if any thing?
A. No, his hair was some gray, but not so much as yours of course.
Q. Was it notic-ably grey unless you got close to him?
A. No sir.
171 Q. What was the color of his mustache?
A. He had a light mustache.
Q. What was the appearance of his face?
A. His face was very narrow.
Q. Narrow faced.
A. Yes sir.
Q. And he had some color in his face all the time, didn't he?
A. No he didn't have much color in his face.
Q. He had some color?
A. Oh yes, yes sir.
Q. And was he stooped?
A. Stooped some, not bad.
Q. Very slightly stooped?
A. Yes sir.
Q. Always held his chin up a little, rather kept his face elevated a little bit?
A. I don't recollect that.
Q. Well, now I want to see how well you recollect him Mr. Groomer in the days when he lived on his farm, and in the days when his wife was in health, and he was a prosperous man in those days wasn't he when he lived up there by you?
A. It seemed like it. From the looks of every thing that he was prosperous.
Q. Usually had a very pleasant expression, or a slight smile on his face, didn't he?
A. Oh, I don't know.

Q. Didn't he smile a good deal in conversation?
A. He was a very good natured kind of a fellow.
Q. Now he used to come by the lumber yard there, and talk to you did he?
172 A. Yes sir.
Q. And that little cough that you mention was just such a cough as pretty nearly every body has in clearing their throat, isn't it. You have heard a great many men cough, haven't you?
A. Yes sir, I have heard considerable coughing in my time.
Q. Just once in a while you can remember of hearding him cough?
A. Well, probably heard him cough nearly every time I saw him.
Q. Just a little like, kind of clearing his throad wasn't it?
A. Yes sir.
Q. That was in the winter, more particularly wasn't it.
A. I think he was stronger during the summer time than he was through the winter.
Q. When did you go out of the lumber business in Weatherby?
A. In September, 1901.
Q. Now you moved to Pattonsburg immediately after that?
A. Not until the next June, no sir.
Q. From Weatherby to Pattonsburg?
A. Yes sir.
Q. Where did you live in the interim?
A. I lived at Weatherby.
Q. What did you do at Weatherby during that time?
A. I didn't do much of any thing.
Q. Were you about the streets much?
A. No, not much during the Fall and winter.
Q. Did you see Mr. Roloson?
A. I saw him once in a while, not very often.
Q. Were you ever in his home?
A. At Weatherby?
Q. Yes.
173 A. I was in a time or two to see him when he was sick.
Q. When was that you were there when he was sick.
A. It was immediately after his wife died when he was sick, I don't know just what month it was.
Q. She died in October, 1899?
A. It was that winter he was sick. I was not in his house after the time of his sickness.
Q. Now after he had that sick spell, he recovered from that didn't he?
A. Yes sir.
Q. And then he went on and attended to his business as usual?
A. No, I don't think he attended to it as usual.
Q. Well, did he attend to it?
A. Yes sir, him and the other boys together.
Q. He and the other boys had always attended to business together hadn't they?
A. Well as far as I know, yes sir.
Q. They are farmers, had been right together and they had all attended to business together.

A. It seemed like Mr. Eber was the manager of the whole thing, that is the head boss, and the other boys worked for him, and helped him.

Q. He was a man of vigorous, intelligent mind wasn't he, in a business way?

A. Yes sir.

Q. The fact is, that what he accomplished and what he did was surprising, considering his physical ap-earance, wasn't it, at all times that you have known him?

A. Yes sir. I don't know whether he held on—now at first
174 when I first got acquainted with him, he was a man of considerable business; he rode all over the country on horse back, and bought stock, and shipped and fed, and was a very busy man.

Q. And he was a delicate looking man at that time?

A. Yes sir, he was not the strongest looking man I ever saw.

Q. Wasn't strong at that time, and you didn't think as he grew older when he passed 50, you didn't think he presented the vigor he formerly presented?

A. No sir.

Q. You are about 45 aren't you?

A. Yes sir.

Q. You are not as stout yourself as you were 10 or 15 years ago are you?

A. No sir.

Q. Do you know what doctor attended Mr. Roloson at the time he was sick after his wife died?

A. No sir, but it seems to me like Dr. Lee attended him, and Dr. Patton came once in a while from McFall.

Q. Did you know Dr. J. W. Baker?

A. Yes sir.

Q. Didn't he attend him?

A. I don't recollect whether Mr. Baker had left Weatherby or not at that time.

Q. That was in the winter of 1899—now we are speaking about just following his wife's death. Did you see any physician there?

A. I saw Dr. Patton there, and spoke to him, but I can't say whether it was at his wife's sickness, or his.

Q. Which Dr. Patton?

A. Dr. Charlie Patton.

Q. Do you know him—I wish they would both stand up if
175 they are here—which one of those 2 men was it?

A. This one over here, this is Charlie.

Q. That is the one you saw, Dr. Charlie is the older one?

A. Yes sir.

Q. You saw him there?

A. Yes sir. I don't know whether it was the sickness of his wife, or Mr. Roloson, I don't recollect.

Q. You are not sure about it now which one it was—did you sit up on the night with Mr. Roloson when he was sick?

A. No sir.

Q. Just dropped in for a few minutes?

A. Yes sir.
Q. Did he talk to you?
A. No, I don't think he talked any, just spoke to me.
Q. Who was nursing him, and looking after him?
A. I don't recollect, but it seems to me like his 2 brothers were there, Howard and Cass.
Q. How long was he sick?
A. I couldn't say.
Q. Did he cough when he was sick, did you hear him cough then?
A. No sir, I didn't stay long enough to hear him cough?
Q. You didn't hear him coughing when you were in there at all?
A. I don't think I did.
Q. You don't know whether he had bronchitis or not?
A. No, I don't.

THOMAS STRONG was next called as a witness on behalf of defendants and being duly sworn testified as follows:

Direct examination by Mr. KERR:

Q. Your name is Thomas Strong?
A. Yes sir.
176 Q. Where do you live?
A. Maysville, De Kalb county, Mo.
Q. How long have you lived there?
A. 6 years.
Q. Where did you live before that?
A. Before that I lived 2 miles north of Maysville.
Q. What is your occupation.
A. Well, before I moved to Maysville it was farming, and since that I was well auger 2 years, and since that I have been working there at Maysville.
Q. Did you know Eber Roloson?
A. Yes sir, I have known him since 1901, I believe.
Q. What time in 1901 did you become acquainted with him?
A. Why it was the last of August, or September. I don' know exactly just which.
Q. Did you observe his physical condition at the time you became acquainted with him?
A. Yes sir, some what.
Q. What was it.
A. Well, I could relate the circumstances to you how I happened to notice him.
Q. Well, go ahead.
A. Me and Mr. Sherard, the fellow with me, drove through there, he was at Howard Roloson's, or Cass Roloson's, and we drove through the lot and saw Mr. Cashius standing there, and we just spoke as we passed through going to work, and when we got down there I asked Mr. S. What corpse was that standing up there.

Mr. RANDOLPH: We object to that.

The COURT: You can not give any conversation that you
177 had between yourselves. You may state what you saw. Your answer is stricken out.

A. I saw Mr. Roloson.

Q. How did he look and act?

A. Well, he looked to me to be a rather sick man; looked perfectly pale, sallow, and no color much about his face looked to me like.

Q. Did he appear weakly, or strong for one of his physique and age?

A. Weak, from the way he moved around.

Q. How moved?

A. Rather slow, and feeble like, like he didn't feel much like going.

Q. Did he say anything to you or in your presence, about his health?

A. Yes sir, that evening when he came up from work we asked him how he was, and how his health was. Well says he, my health is not good; it appears to be a perfect wreck to me now.

Q. This that you have related, took place one day and one evening, did it?

A. Yes sir.

Q. Did you see him the next day?

A. Well, just saw him the next morning, that is all.

Q. Did you see him frequently after that?

A. Well, that was not when we had this first conversation about his health. We had put up the team. I saw him from that on up to bed time.

Q. That evening you say you spent in his company?

A. In the evening, yes sir.

Q. Did you ever see him after that?

A. Yes sir.

Q. Where?

178 A. Well, I saw him at Weatherby once or twice after that I think, 1902. Never talked to him only what I done that night, was all the talk I had with him.

Q. Did you see him more than twice after that?

A. Yes, I saw him at Howard's once after that, in 1902. We was past there, and he was there, but I never had no conversation with him at all.

Q. Did you observe any thing more than you have stated concerning his physical condition at these other times?

A. No *so,* nothing only he seemed to look perfectly sallow, and weaker like.

Q. What was the relative condition of his health the last time you saw him, as compared with the first time you saw him?

A. Well he looked somewhat thinner. I never talked with him the last time, only met him, saw him there in Weatherby.

Q. As to his health and strength on the last occasion as compared with the first?

A. He seemed to look worse all the time to me, that is, weaker.
Q. Did you observe whether or not he coughed?
A. Not them times at Cashius', at first he did.
Q. What have you to say about his coughing on the occasion of your first meeting him?
A. That evening after we got the teams put away, me and him went on up to the house and met in the room.
Q. You and Mr. Roloson?
A. Yes, Mr. Eber. We was sitting in there, he sat down in the big rocking chair. He sat there, and would cough every once in a while, and he would lay his hand up here, and kind of straighten back, and say, Oh my, and cough a little.

179 Cross-examination by Mr. RANDOLPH:

Q. I understood you to say you were a farmer living north of Maysville, until 11 years ago?
A. Yes sir.
Q. Then you moved to Maysville?
A. Yes sir.
Q. Then for 2 years you worked with a well auger.
A. A year and a half, and since then in a livery stable.
Q. You never saw Mr. Roloson until August, was it, 1901?
A. It was August or September, one or the other.
Q. On late in the summer, or in the Fall of 1901?
A. Yes sir.
Q. Sure it was 1901?
A. Yes sir.
Q. Then you went up on his farm to bore a well?
A. I don't — which the farm belonged to, it was where Cashius Roloson lived.
Q. Mr. Eber Roloson you say was there?
A. Yes sir.
Q. Did he leave the next day?
A. I don't know; he hadn't left when I did.
Q. Did you leave the next morning?
A. Yes sir.
Q. Just stayed over night there?
A. Yes sir, we got there about 10 o'clock.
Q. And left the next morning?
A. Yes sir. We got there about 10 o'clock that day, and left the next morning.
Q. And he was still there?
A. Yes sir.
180 Q. Was he around where you were boring the Well?
A. No sir, never about there.
Q. Didn't he come out there and show you where to bore?
A. No sir, Cassius told us where to bore.
Q. You didn't know whether he had had a little sick spell at that time or not?

A. Only what he said; he said my health is no good to me, appears to be a perfect wreck to me.
Q. ...n did you tell these attorneys on the other side, this?
A. Why when he was talking about it to-day.
Q. How did you come to come down?
A. They subpœnaed me.
Q. Were you subpœnaed, or did you come on invitation?
A. I was subpœnaed.
Q. Whom did you tell this to first?
A. Well, an attorney, or lawyer, or something in Kansas City, I guess.
Q. How long ago was that?
A. It hasn't been over three weeks.
Q. Was that the first you ever told any body about it?
A. No sir. Of course I talked about his health, but I never told the whole story.
Q. Whom did you tell it to.
A. Told him about being up there; didn't tell him all the circumstances, nothing about it.
Q. Did you go to him and volunteer it?
A. No sir, we were riding along and he asked if I knew him.
Q. Driving for a livery stable?
A. Yes sir, and he asked me if I knew him.
Q. What lawyer was it, do you know his name? Was it
181 Mossman?
A. Must be something like that.
Q. This young man with the glasses?
A. Yes sir.
Q. And you told him about it while you were driving him?
A. Told him about being up there, yes sir.
Q. Did you know he was a lawyer in this case at that time?
A. Why no, not just when I told him about being up there; he told me a few minutes afterwards.
Q. You were helping him hunt up witnesses?
A. I don't know what his business was. I drove him to the sale I don't know what business, he never told me.
Q. How many times did you see Eber Roloson?
A. Saw him at Cassius' once a year after.
Q. A year later?
A. Yes sir, the next season.
Q. What was he doing at that time?
A. Not doing any thing at all.
Q. Moving around the place?
A. Standing out there by the road. I went up there, I traded horses with Cassius, but didn't change with him at that time, and I took the one up to change with him and he was there.
Q. Standing by the road?
A. In the lane I think, somewhere close to the road, of course not right in the road.
Q. You didn't know him during the previous year; didn't know whether he was always of delicate appearance or not?

A. No sir.
Q. You don't know any thing about his activity? The extent to which he attended to business?
182 A. No sir.
Q. Nor anything about that?
A. No sir.
Q. Where are you stopping Mr. Strong?
A. Well, I stayed a couple of nights down here at the Ryan House.
Q. Who paid your bill?
A. Nothing said about any bill.
Q. You didn't have to pay any?
A. Never have stayed but 2 nights.
Q. Did any one tell you they would pay your bil-s?
A. No sir.
Q. Were some of the other witnesses for the Insurance Co. down there to-, quite a number of them?

Mr. KERR: We object to that *is* incompetent, irrelevant immaterial, and not cross examination.
The COURT: Sustained.
Mr. RANDOLPH: It might — material in view of the question I am going to ask.
The COURT: Well ask the next question.

Q. Was Mr. Mossman down there with you at any time?
A. No sir, I never saw him there.
Q. Nor any of the attorneys for the defendants?
A. No sir, if there was any there I didn't know it.

Redirect examination by Mr. KERR:

Q. You never saw Mr. Mossman did you, until you were sent out to drive him around the country?
A. No sir.
Q. Didn't know who he was?
A. No sir.
183 Q. And during the drive he asked you about Eber Roloson?
A. He asked me if I knew Mr. Roloson?

Plaintiffs object to the questions as leading.
The COURT: The questions are somewhat leading.

Q. And that was the first time you had spoken to him about it?
A. Yes sir.
Q. And when you did speak the first time you didn't know he was connected with the case at all?
A. No sir, I didn't k-ow a thing about it.

Mr. DUNHAM, was next called as witness on behalf of defendants, and being sworn testified as fol-ows:—

Direct examination — Mr. KERR:

Q. Your Full name?
A. J. R. Dunham.
Q. Where do you live?
A. I live now about a mile and a half north of Maysville?
Q. How long have you lived there?
A. About three months.
Q. Where did you live before that?
A. 5 miles north west of Weatherby.
Q. How long did you live there?
A. About 3 years.
Q. Your occupation.
A. Farmer.
Q. How long had you known Eber Roloson before his death?
A. I knew him 5 or 6 years. I was not much acquainted with him until he moved to Weatherby.
Q. After moving to Weatherby did you see much of him?
A. Probably once a week, sometimes twice a week; maybe once in 3 weeks.
184 Q. What was his physical condition during the time he was living in Weatherby, as it seemed to you?
A. Well, he looked thin, lo-ked like a worn out man, lo-ked pale like there was no blood in him hardly.
Q. Did you notice his ears?
A. Why, his ears looked thin.
Q. Can you describe in your own way his condition in greater detail just tell the jury?
A. I don't know as I can. He was just a thin, pale man, sallow color.
Q. Did he seem strong or otherwise?
A. No he didn't seem a strong man then. I saw him on the street walking around, sometimes in DeHart & Riggs' store, and sometimes at the stock yards.
Q. Did you talk with him at any time?
A. Not much. I would meet him once in a while, and ask him how the market was, something like that.
Q. Did you notice whether or not he was affected with a cough?
A. No sir, I don't know as I ever heard him cough.
Q. What was the last date which you saw him, to the best of your recollection.
A. Well, I don't know—some time before he took sick.
Q. It appears here, that his last illness commenced in December 1902. With relation to that date, what have you to say as to the time you last saw him.
A. I could-'t tell you. I don't know how long he was sick. Don't know how long he was in his bed before he died.
Q. Did you notice any perceptible difference in his physical conditi-n during the last few years of h-s life, one way or the other?
A. Well, he lo-ked more frail, more weaker to me.
185 Q. At the latter period of his life, or earlier?
A. At the latter; I didn't know him long.

Q. You mean to say that he appeared weaker toward the last than before?
A. Yes sir.

Cross-examination by Mr. RANDOLPH:

Q. The last few months that fall he appeared weaker to you?
A. Yes sir, he seemed more frail.

Dr. GEIGER was next called as a witness on behalf of defendants, and being duly sworn testified as follows:

Direct examination by Mr. BROWN:

Q. Dr. Geiger, will you give the stenographer your first name.
A. Jacob Geiger.
Q. Where do you live Doctor?
A. This city, St. Joseph.
Q. How long have you lived here?
A. About 46 years.
Q. What is your profession?
A. I practice medicine and surgery.
Q. How long have you practiced?
A. 36 years.
Q. What has been the nature of your practice, doctor?
A. I have been a general practitioner until the last 12 or 15 years, I have devoted more time to surgery, than the general practice.
Q. Have you done Scholastic work, in connection with the medical scho-ls?
A. Yes sir. I have been teaching medicine.
Q. What chair do you now hold?
A. The chair of surgery in the Ensowrth Medical College
186 of this city for the last 25 years, also the chair of surgery in the medical department of the St. Louis University, for 15 years.
Q. What is the difference betw-en progressive and pernicious an-emia, if there is any.
A. There is no distinction made. Some that have written on the subject, attempt to make a little distinction, but as a rule both terms are used, progressive, pernicious.
Q. They are used interchangeably?
A. Yes sir, interchangeably.
Q. Doctor, I desire to hypothecate the history of the case now under co-sid-ration. The evidence here tends to show that Mr. Eber Roloson——

Mr. RANDOLPH: If the Court please, I want to object to his attempting to relate testimony. I do not understand that a hypothetical question is put by attempting to relate the evidence of the case, but a hypothetical state of facts. A supposed state of facts, based on eviden-e is stated, and the Court determines whether it is based on the evidence, when properly put.

The COURT: You can assume a given state of facts, consistent with the evidence, according to your information..

Q. We will assume then, that Mr. Eber B. Roloson's wife died of pulmonary tuberculosis, some time late in the fall, I think in October, 189-, and had been sick of that disease for more than a year, and Mr. Roloson had been with her, and assisted in taking care of her, that he had been a spare man before that time, of delicate build; that after that time, immediately after that, the death of his wife, he had an attack of some sort of bronchial difficulty, that he began to decline, that he had some cough from betwe-n that time to the time of his death, and grew more delicate; that he took his bed
187 about the 17th. of December, 1902 and died on the 28th. day of February, 1903, of progressive or pernicious aen-emia—it is described by both terms here,—what should you say produced his death, was the cause of his death, what, in your opinion.

Mr. RANDOLPH: We object to the question for the reason that it is not based on the evidence; there is no evidence in this case that shows that he took to his bed at all in the month of December, nor any evidence that shows when he took to his bed. Or that he was afflicted with any disease whatever until the time of his death, it has only been shown what he died of.

Mr. BROWN: It may be I am mistaken about the introduction of evidence, but if I understood it right, or heard the agreement about the proof of death being in evidence, that stated that he began to be sick on the 17th. of December. I will change my question and say instead of took to his bed, I will say began to be sick about the 17th. of December.

The COURT: There is evidence here, enough for this question. You may answer the question.

To which ruling of the Court, Plaintiffs at the time excepted.

A. It is generally understood, and is my opinion, that progressive aen-emia is never the disease perceived. It is always secondary to something else; that it is not the disease in itself.

Q. From that history, provided it is true as I have told you doctor, what in your opinion, would be the cause, the true cause of the fatality.

A. Well, that of course I can not say. We do know that consumption especially those that have nursed consumptives, particularly man and wife that are constantly together, occupying the same bed and the same room, that they are very liable to transmit
188 the disease, or in other words, became contaminated. If the wife has consumption the husband may take it, and vice versa. Whole families sometimes die off that way in a few years, after one member of the family has had consumption. This is a well known every day fact, but they are liable to. I do not know the cause of this individual's death I can not say. If he had a cough and developed aen-emia, which simply means a reduction in the number of red corpuscles, and we can only have a reduction in the number of red corpuscles if we have something that is killing the red corpuscles, or something preventing their formation, because they are constantly being replenished, if there is something that cuts of- nutrition, or if there is some poison circulating in the blood, such

as cancer poison or tuberculosis, or any other organic disease, the formation of blood is diminished, and we have as a result a diminished quantity or number of red corpuscles, to which the term aen-emia is applied. and when that process is so very active, then it is spoken of as pernicious, the term pernicious means; when it goes on from bad to worse it is progressive, so there is nothing particular in the expression, progressive, pernicious. If it goes on, and becomes bad you certainly have progressive, pernicious aen-emia, but it is always secondary to something else. That is my opinion, and nearly every author that I know of, so says, although some writers that have stated that so and so thought it might originate independent of any disease, but they qualify that by saying that simply because we have been unable to detect any other disease; but it is generally understood, that aen-emia to-day is secondary to some other disease.

Q. Will you state the more usual, as they occur to you, causes of aen-emia.

189 A. Cancer can produce aen-emia, consumption, inflammation of the stomach, liver diseases, pernicious habits, bronchial troubles, any thing that produces a disease of the digestive organs, or the blood making organs, may produce aen-emia; improper food, bad sanitation, all have a tendency to produce a pernicious pr-gressive aen-emia, as we call it. it is generally secondary to something else, but we do not always find out — the primary disease is, because we have not an opportunity of holding a post mortem on those that die.

Q. State whether consumption is one of the usual causes or not of aen-emia?

A. Nearly all persons that die of consumption, if they have had it for 2 or 3 months, or longer, are aen-emic; they are all pale, bloodless, livid, and that is aen-emia in a manner.

Q. So that is one of the symptoms of later consumption?

A. Yes, not only a late symptom, sometimes along after a few months the quality of the blood becomse changed. There is a loss of proportion between the white corpuscles and the red corpuscles; in other words, the red corpuscles either die off or are not reproduced rapidly, and the white corpuscles remain in their proper proportion to the bulk of blood, and then we have as I say, too many white corpuscless compared to the red corpuscles, or more properly too few red to the number of white, and that gives the patient that tallowy, white, bleached appearance.

Q. Are there any mental symptoms that are common to aen-emic cases?

A. The whole system is below par; mental and physical, although the mental system as a rule suffers less than the physical, because we have those patients frequently perfectly at themselves, and able to perform mental duty, but so weak physically that they can

190 not walk or sit up.

Q. Does it have any effect, doctor, upon the spirits of the patient?

A. All diseases are more or less depressive.

Q. Are there any stomach disturbances that are ordinarily incident to it?

A. To aen-emia?

Q. Yes sir, aen-emia?

A. Well, the whole mechanism is below par. And as a rule that rule works the other way. Stomach diseases diminish the quantity of blood and favor aen-emia.

Q. Then stomach diseases would be one of the natural causes of aen-emia?

A. One of the causes.

Q. It is suggested that I ask you what gastritis is.

A. Gastritis is an inflammation of the stomach.

Q. And what are its effects.

A. Inability to retain, to take food, destroy the appetite, and inability to retain food. The term ought to be qualified either acute, sub-acute, or chronic. We have very few cases of acute gastritis, that means that has a short course, occurs mostly in men that drink whiskey, have acute gastritis; the more chronic form of course the symptoms are milder.

Q. Does it result in what we ordinarily call dyspepsia?

A. That is a form of gastritis.

Q. What is sub-acute?

A. Simply means it is a degree between the acute form, and the chronic and passive form, or may have periods of aggravation, and periods of amelioration.

Cross-examination by Mr. RANDOLPH:

Q. Suppose it was shown that the person who died of pro-
191 gressive aen-emia did not have tuberculosis, nor any symptoms of tuberculosis, and did not have any diseases of the brain, or heart, or lungs, or other vital organs, but that some two years, or three years before his death he had had an attack of sub-acute gastritis, from which he had recovered; that three years, or about three years after that time he had purchased a large number of cattle, one hundred and fifty head, had purchased a large number of hogs, some 360 head of hogs, and during the late fall, 300 head of those hogs had died, and the market had gone down on the cattle, so that a large loss was staring him in the face, which produced a great amount of mental worry, so that for 2 or 3 months, or 3 or 4 months, he was in a constant state of mental worry, and agitation over financial matters, and was taken sick about the last of January, and on the 9th of February, the cattle were shipped out while he was sick and that then, when the returns came in he had suffered a loss of some five thousand dollars, which almost meant the wreck of his fortune, together with other losses, and 19 days afterwards he died; now with those conditions, and the physicians who attended him says that he died of pernicious and progressive aen-emia, what would you say had been the cause of the aen-emia?

A. Well, that can not be answered that way.

Q. I want you to answer on the conditions.

A. If you tell me that a certain person has whooping cough, and

had whooping cough and nothing else, and they died, and you ask me what they died of I would have to say they died of whooping cough.

Q. I asked you the cause of aen-emia that produced his death?

A. I was getting at that; it depends on the individual. Some men will stand the loss of $5000.00 better than others. It does not depend entirely on the amount of money.

192 Q. I do not care about that. I want to know in your judgment what produced this aen-emia under those conditions.

A. I could not tell unless I saw the patient, or had an opportunity to hold a post mortem. I think the aen-emia was produced by some organic, or vi-ceral disease.

Q. If the evidence shows though that it was not what would you say then was the cause?

A. I do not think they found the cause, if they did not hold a post mortem.

Q. Will not mental worry and excitements, and discouragement produce aen-emia?

A. No sir; it may destroy appetite, but I think $5000.00 might disturb my digestion a few days, and might any body, but I do not think it would lead to absolute destruction of appetite, power to take food, and the patient die from want of blood.

Q. Suppose that it did destroy the appetite, and get him in a mental condition where he had no desire to eat, can mental worry be severe enough to produce aen-emia?

A. Worry is depressing to the organism; we know that.

Q. Depression is what produces it?

A. Only it does not kill the red corpuscles.

Q. Does not depression produce aen-emia?

A. No sir.

Q. Isn't it the depression consequent upon the condition that makes——

A. There is somthing between the two.

Q. Would depression, caused by mental worry, which produces a nervous breakdown, or a nervous break down being produced, wouldn't that run into aen-emia, or aen-emic conditions.

A. It might, and might not. If the individual was so de-

193 pressed and worried and fretted that he could not eat nor sleep, I would certainly think he would become more or less aen-emic.

Q. And if Aen-emia set in, it could become pernicious in a short time couldn't it?

A. If he did not eat nor sleep, it would not take very long for it to become pernicious, because the blo-d would not be reproduced.

Q. There is one form you have, that is idiopathic——

A. Do you know what the term means—it means without a cause.

Q. In all the medical works you find the term idiopathic aen-emia.

A. When they get it that way you get the definition of idiopathic it means without a known cause—there is no effect without a cause.

Q. Let us get at it now and see. The books teach us that there is an idiopathic aen-emia, don't they?

A. You can find anything in medical literature, the same as you do in the literature of the law, any thing to prove this, that and the other.

Q. Is Osler a standard medical authority?

A. Osler is a good man. I think he has gotten quite cranky lately if you will watch the newspapers you will think so too.

Q. Crankiness doctor is disagreeing with our opinions.

A. No, he has grown eccentric.

Q. There are no eccentric, or cranky people who agree with us—the cranks are those who disagree with us.

A. Not necessarily. I might be a crank, and a crank would agree with me.

Q. Is Da Costa a standard medical authority?

A. They are both good men.

194 Q. You say that notwithstanding the fact that the medical books teach us, teach the student, that there is idiopathic aen-emia——

A. If you will digest Osler thoroughly, that arti-le on aen-emia——

Q. Just answer the question. You say in spite of the fact that the medical works teach that there is an idiopathic aen-emia, you say there is no such thing.

A. I don't say that. I say this, that the word idiopathic has been held on to, and just as explained before, you use the word with aen-emia, whether you call it progressive or pernic*uios*, or with any other term, whether you prefix it, or affix it, it don't make any difference, it is generally understood that it is secondary to some other disease, but we do not always know the primary disease, and for that reason, because we do not know the primary disease, and can not see it, handle it, demonstrate it we use the term idiopathic. That is what I said before, and I say so now.

Q. You mean by that that aen-emia must have a cause?

A. It must have a cause; it must have an organic cause.

Q. You trace the cause from one disease to another?

A. In this case; in other words, aen-emia is not a disease in itself. That is, any more than dropsy is a disease in itself.

Q. Is consumption a disease in itself?

A. Yes sir; secondary to the germ.

Q. The germ produces it?

A. That is the seed.

Q. Does the germ produce aen-emia?

A. Oh, no, it has got to produce the destruction of tissue first.

Q. You speak of dropsy.

A. Yes sir.

Q. Dropsy is a mal secretion?

195 A. Not necessarily, no.

Q. Does not the water that causes the bloating go to the place that it does not belong, isn't it separated from the other fluids of the body in a manner that makes it deposit in certain places?

A. Whenever it goes outside of the blood vessels it is not regular. It is not necessarily a mal secretion, but may be dammed up.

Q. Is the fluid that is taken from the heart—is the fruid that is taken from the heart in dropsy when tapped is the f-uid taken from the body when a person is tapped for dropsy, is that a natural secretion.

A. Why no.

Q. It is not.

A. No, it is not a secretion at all.

Q. It is a mal secretion isn't it?

A. You used the wrong term you mean excretion, not secretion.

Q. It is a mal secretion. The secretions are all formed in the body and take place in the body, and they are either natural or unnatural.

A. All the outlets are not secretions; some are excretions.

Q. Excretions are the natural outputs of the body?

A. Yes sir.

Q. You say the dropsical water is not a natural secretion, so it can not be a natural excretion, either, although it ought out of the body.

A. Certai-ly.

Q. Then it must be a mal secretion?

A. That is a far fetched result, not the disease, simply a result. Dropsy is only a symptom.

Q. What produces it?

A. Heart disease, liver disease, kidney disease, and aæn-emia.

196 Q. What is it that throws the fluid into the system.

A. Simply because the system does not throw them off; the organs have not the power to throw them off.

Q. What is it that causes the blood to be impoverished in aæn-emia.

A. I have already stated that certain poisonous water, consumption cancer juice, syphilis, many other things, lead po-soning may destroy the red corpuscles.

Q. If a man has none of those things?

A. If he didn't have any thing else he would not have aæn-emia in my opinion.

Q. Now the common term, among ordinary people for aæn-emia, is poverty of the blood.

A. Poverty of the blood? Well the term has a wider range of application; it means the diminution in the entire bulk of blood as well as poverty.

Q. It is an impoverishing of the blood.

A. Quantity and quality.

Q. A person may have aæn-emia and at the same time may accumulate flesh, may they not?

A. Yes sir, they may take on weight.

Q. They may accumulate flesh, especially about the abdomen.

A. Yes sir, especially if they became dropsical from it.

Q. Not while they are accumulating flesh doctor—they -ay accumulate flesh?

A. I say they increase in weight.

Q. Now if Da Costa, or Osler, or the other medical authorities say that there is a deposit of solid flesh often around the abdomen, are they mistaken?

A. Do they say flesh or fat?

197 Q. Fat.

A. A different thing again.

Q. Is there a deposit of fat then?

A. Fat is the lowest tissue that we have, and it is not an indication of health by any means.

Q. Doctor, acn-emia, one of the symptoms, is the softening or br-aking down of the walls of the blood vessels, isn't it?

A. Yes, with a blood change, you are liable to have other changes and the other changes may lead to blood changes—yes sir, I say it is not a single sim-le condition, it is a complex condition, and dependent upon some visceral or organic disease.

Q. Now the blood is made from what we eat and drink, that is, it is kept up?

A. It is resupplied in that way.

Q. If the proper foods enter the system, the proper liquids and solids——

A. A parallel between——

The COURT: Let him ask the question.

Q. If the proper solids and liquids enter into the system, and are properly assimilated, and digested, the red corpuscles of the blood will be maintained.

A. I was going to add a sup-lement that is necessary.

Q. Can't you answer that question?

A. Not the way you put it, because it is incomplete.

Q. I wish you would try and answer it.

The COURT: Answer in your own way.

A. If nature did not perform the other functions of letting off the waste it would not last long. You would have blood poison.

Q. If it did not let off the waste?

A. Yes sir.

198 Q. We will assume then, doctor, that nature does let off the waste.

A. Yes.

Q. There is no waste until there is an assimilation of the food and a separation of the various parts in the mechanism of the body?

A. Yes sir, you put a person to bed this minute, weigh them, furnish them no food, no water, weigh them tomorrow, and they will weigh less, action of the kidneys, skin muscles and the carrying on of the functions.

Q. If there is nothing voided from the body then what goes away is separated by the system from what is put into the system?

A. It has a long routine.

Q. I understand that, but let us get at the ultimate facts. What you take into the system is separated into the parts that is used to nourish the system, and into excretions that pass away from the system.

A. Yes.

Q. Now as to food taken into the body, if properly separated, and the functions of the body in throwing off waste material, or effete

matter, or whatever it is, are properly perfoemed, the blood then is properly nourished?

A. Unless there is some intervention of some poisonous material thrown in, going on in the system.

Q. Just answer the question, if those things are done——

A. In a healthy system.

Q. Now does the blood furnish the life and energy?

A. Yes sir.

Q. Now does the blood cause the action of the heart, or does the action of the heart cause the circulation of the blood?

A. I don't understand the question quite?

199 Q. Does the life in the blood cause the heart to beat, or does the beating of the heart cause the blood to circulate.

A. They are so dependent if you deprive the heart of the blood it won't pump, and if you deprive the blood vessels of the heart there will be no force behind the blood.

The COURT: I think we have had enough of medical philosophy.

Q. Now doctor, suppose this patient's heart was entirely regular and if he had any trouble of the heart a physician could ascertain it, couldn't he by an examination?

A. A physician, or any physician do you mean?

Q. A standard physician, could detect it couldn't he? You could, *could* couldn't you?

A. There may be some heart affections that I could not detect ordinarily.

Q. An ordinary physician would detect it?

A. A moderately skillful physician would detect the usual forms of heart disease.

Q. If there is cancer, that is not hard to discover, after it has stood for some time, is it?

A. No, if it is advanced, that if it is on the surface you may detect it early, if you can see it. If it is internal you will have to wait until it interferes with the exercise of the function of some organ, or part, or produces a growth.

Q. But it is determinable?

A. We can determine that there is something there, do not always know that it is cancer.

Q. Tuberculosis is determinable by physical examination?—you can tell whether a patient has tuberculosis?

A. If you limit that—you might not be able to detect

200 it if it were in the brain.

Q. Of the lungs, we will say.

A. Yes, generally detect it.

Q. Easily discernable?

A. No- so easily—depends on the form.

Q. It depends on the physician whether it is easy or hard—it would be easy for you.

A. Right at the start I may not be able to detect it.

Q. How long standing would it have to be?

A. I think I could detect it on an individual before he died, but may not be able to detect it in it- incipiency.

Q. How long would the incipiency last.

Q. Some times for 20 years, and no doctor has recognized it as such. We know the germ remains dormant and passive for a long time, and suddenly are awakened into activity, and in a few months the patient dies.

Q. If the doctor could not discover it the patient himself would probably himself not know it?

A. Certainly, and a good many of them don't believe it when they are told.

Q. In fact, tuberculosis is a disease that men seldom believe they have?

A. That is very often the case.

Q. They — always buoyed up by hope with it?

A. Yes sir.

Q. Now doctor, if this party had been examined by five different physicians, living in different localities, that is, not far apart but in different localities, and had been examined at least once each eight months, or nine months, by one of these physicians, and none
201 of these diseases had been discovered would you say that the patient himself could know that he was afflicted with any of those diseases?

Mr. BROWN: We object, because we do not think it is proper to make this doctor the judge of another one's work; that is, it involves passing upon whether or not another physician might or might not do his work. It is not a professional question.

The COURT: That is not the question. He is asking whether the patient himself would be likely to know he had the disease if five doctors under the circumstances examined him and did not find it.

Mr. BROWN: That is not an expert question.

The COURT: I think you are correct on that. The objection is sustained.

To which ruling of the Court Plaintiffs at the time excepted.

Q. I want to read you six or seven lines, to get your opinion on pernicious aen-emia, which you say is interchangeably used with progressive aen-mia, that the- are practical-y the same thing.

A. The two terms are usually used together.

Q. I am reading from page 740 of Da Costa, 9th Edition: "Pernic-ous aen-emia, this is an extreme aen-emia, advancing steadily, or with remission towards a fatal ending, yet no certain cause can be detected for the profound and disasterous alterations the blood is undergoing. To pernicious aen-emia belong most of the cases of essential or idiopathetic aen-emia." Do you disagree with that?

A. He says no cause has been found; he don't say that there is not, and all others say that there may.

Q. You don't answer the question. I want to know if you agree with that as a correct statement.

202 A. That is not my understanding of the statement. Dr. Da Costa has been dead several years, and that book has been published a good many years.

Q. "The disorder is most frequent in women, and has been especially observable in child bearing women, after several pregnan-

cies, still it sometimes happens in men, especially before the age of forty."

A. That is right, in middle life.

Q. "It sometimes seems to have its origin in long continued dyspepsia or ——— atrophy of the gastric tubules, or to arise after protracted hemorr-ages, or incessant worry." Do you agree with that?

A. If he had simply qualified that term, excessive worry, and stated the effects upon the digestive and assimilative organs then there would be a good connection, but he simply throws in the term worry. Now worry produces a loss of appetite, and indiggestion, and necessary impairment of the blood making processes.

Q. Incessant worry produces the conditions that cause aen-emia?—now then it may work suddenly if the worry is of sufficient time work suddenly to aen-emia, may it not?

A. Oh, aen-emia begins slowly, in proportion to the amount of poisons that are entered into the system, or retained in the system.

Q. Let us not talk about poision. Let us talk about incessant worry; start with incessant worry, and keep up incessant worry, and it will produce the cause that you say produces aen-emia?—that you say produces the causes that do produce aen-emia?

A. Yes, there is quite a space between worry and the death of the patient from aen-emia.

Q. That cause might progress very rapidly?

A. I think if the patient did not eat any thing it would be very quick.

203 Redirect examination by Mr. BROWN:

Q. The author that Mr. Randolph cal-ed to your attention, that you said was a little notional, Osler, is that the person who says that every person over 60 ought to be chloroformed?

A. Yes sir.

Dr. T. H. DOYLE, was next called as a witness, and being duly sworn testified as follows:

Direct examination by Mr. BROWN:

Q. What is your full name?
A. Thomas H. Doyle.
Q. Where do you live?
A. St. Joseph, Mo.
Q. How many years have you lived here.
A. Lived here since the early part of March, 1869.
Q. Your profession is physician and surgeon?
A. Yes sir.
Q. How long have you been in the practice, active practice?
A. Since the middle of March, 1865.
Q. You have practiced here?
A. Only since 1869, but altogether 40 years.
Q. Doctor, I desire to hypothecate to you the case that is now before the Court, for trial. Suppose that in 1899, Mr. Roloson's wife, who had been sick for a year or more, at that time, with pulmonary

tuberculosis, and he had been with her al- the time and nursed her to some extent, and that she died in October, 1899; that Mr. Roloson had been a frail man in appearance for a number of years; that after his wife died he was taken sick, was sick some three weeks with bronchial trouble, and after that began to fail, and grew more delicate, and finally became worse, so that sickness began about
204 the *in* December, 1902 and he died in February, 1903, of progressive or pernicious aen-emia what would you say, without—knowing those facts, what in your opinion would be the cause of his death?

A. I understand he was sick 2 months?

Q. Sick just 2 months; that is, down 2 months, but had been failing since the death of his wife.

A. That would be a hard question; he might have died of a great many diseases, Mr. Brown. I would not hardly know what to ascribe it to from that statement.

Q. What is the cause of pernicious aen-emia?

A. Pernicious aen-emia may be due to a great many different causes. Generally due to causes which produce changes in some of the organs that contribute to the production of the blood itself; the manufacture of the blood, or else other diseases which have a tendency to destroy the blood corpuscles.

Q. State whether gastric trouble, either chronic or sub-acute, would have a tendency to produce aen-emia.

A. Yes sir, it might produce aen-emia by contributing to interfere with the proper digestion and assimilation of food.

Q. State whether pulmonary tuberculosis would have any tendency to produce it.

A. Certainly would, yes sir.

Q. State whether or not, or to what extent, those troubles are *cuases* of aen-emia?

A. Well, they are all causes of aen-emia. Any disease that interferes with digestion, or assimilation, or that those diseases such as cancer, pulmonary tuberculosis, fevers, and in fact all lingering diseases of all kinds, and all forms of fever, would bring on aen-emia, and every man who goes through a long attack of sickness from any cause whatever, it always produces aen-emia in all cases all
205 ages and in all classes.

Q. State doctor, what is idiopathic aen-emia?

A. Idiopathic aen-emia, you talk of idiopathic diseases when we don't know to what cause to ascribe it to. For instance, now a man may develop some form of fever, and we do not know what causes it; we call it idiopathic fever. When it is developed from a typhoid germ, we know it is typhoid fever; when it is developed from a typhus germ we know it is typhus fever, and the same way with measles, whooping cough, so on.

Q. In cases where it is a specific disease that effects the system like dyspepsia, or gastritis, or the presence of germs of tuberculosis in the system, and the aen-emia superven-s on that, it is attributable to those causes is it not?

A. Yes sir that is right.

Q. In the hypothesis that I put to you, I omitted one of the features that Mr. Roloson, was troubl- with sub-acute gastritis after the death of his wife, and had been some time before, and if aen-emia did supervene, and kill him, and there was no other physical cause present, state whether or not you would attribute it to those trouble-, to gastritis or tubercul*o*r trouble.

A. Well, either trouble might contribute to it, either gastritis that would last a sufficient length of time to interfere with digestion, or assimilation, it would last quite a while though.

Q. The specific thing that I am trying to get at doctor in my question is, as to whether you would attribute it in good practice to the physical cause among the class that you have mentioned, that you saw present, whether you would attribute the aen-emia to the physical causes that you saw present.

A. Well, in the light of no other evidence, as to any other cause yes sir.

206 Cross-examination by Mr. RANDOLPH:

Q. A Short attack of sub-acute gastritis, running over a period of three or four weeks, and then no recurrence of it for a year or 2, then perhaps a short recurrence, a short spell, maybe a week, and then no recurrence within a year or two of the time of death, which was caused by aen-emia, will you attribute that to these little attacks of sub-acute gastritis?

A. I would hardly call it sub-acute, running a course of two or three weeks.

Q. Any form running only a short time, you wouldn't attribute the aen-emia to that?

A. It might give rise to a certain amount of aen-emia, but not marked.

Q. Not pernicious, that would cause death?

A. No sir.

Q. Now aen-emia may be caused from shock, may it not?

A. That is very seldom the case. Shock is something that produces effect at once, and is not conducive to anything like that; it would have to cover a longer period of time.

Q. That may be the producing cause?

A. Might be a starting point.

Q. Do not Osler, Floyd, and Da Costo lay it down that shock can produce aen-emia?

A. It may, the effects of shock, yes sir.

Q. That may follow a severe shock?

A. Yes, it might.

Q. Now the whole -ffect of shock is to the nervous system?

A. Yes sir, nervous centers.

Q. And the effect of shock on the system, is much the same as the effect of mental strain and worry, affects the same organs,

207 and the same parts of the body?

A. Yes sir.

Q. And if shock will produce aen-emia, so will mental strain and worry?

A. Yes sir, continu-d for a long time it wou*k*d.

Q. Suppose that if in November and December, 1902, Mr. Roloson had 300 hogs die, causing him a great financial loss, and a great mental worry, and loss of appetite, and early in February 1903, he lost several thousand dollars on cattle, and that he so suffered from mental worry that he had no appetite, did not care to eat, did not digest his food, and become prostrated and died of aen-emia what would you say produced the aen-emia there; there were no other diseases discoverable—no other diseases discovered.

A. For how long a time do you say?

Q. The loss began and mental worry began in November.

A. Of what year.

Q. Of 1902, and continued through November, December, January and up until February 9th., when the final loss came, a loss staring him in the face all the time, and continued mental strain and worry?

A. That would depend a gr-at deal upon the temperament of the person.

Q. I put it so as to cover every temperament, that the worry was extreme.

A. Well, while a little bit of worry would hurt some men——

Q. I didn't ask you about a little worry, I said extreme worry.

A. I can't imagine a case in which it would be liable to produce death in that length of time.

Q. I didn't ask you that, I asked you if it would produce aen-mia?

A. Yes, a certain amount of aen-emia might occur from that.

208 Redirect examination by Mr. BROWN:

Q. Doctor, we will suppose that 2 years before his wife after a long and fatal sickness of consumption—suppose three years before his hogs died, his wife, after a lingering sickness of more than a year of tuberculosis, in which he nursed her*e*, had died, and aen-emia developed so that he died in three years, which would you think wou*k*d have been the more apt to produce aen-emia, the death of his wife, and the consequent worry, or losing his hogs with the cholera.

Mr. RANDOLPH: We object to the question, because Mr. Brown states that aen-emia developed without stating that no aen-emia was shown or known to have existed, until just previous to his death. He assumes it developed immediately after the death of wife.

Mr. BROWN: I said he died with aen-emia, after the loss of his hogs.

Q. Now which troubl-, if it was produced by one of those troubles, three years after the death of his wife, and the other three months after the loss of his hogs, which would you think -ould be the most liable to have produced the aen-emia, from which he died.

A. Of course the fact that his wife died of consumption, had been sick for how long?

Q. For more than a year.

A. He took care of her a good portion of the time?

A. He took care of her, yes sir, personally nursed her.

A. Well, that is a fact that is recognized by all medical men that tuberculosis is readily contracted from persons, and occurs in persons who are suffering with tuberculosis, who are cared for by others, in fact they have the so-called spitting ordinances in nearly all the large cities against it for this purposes, to prevent the spread of the infection of tuberculosis.

209 Q. Suppose we can see that it is possible that worry could have been the primary cause of aen-emia, which killed him, three years after the death of his wife. Would it be more likely that it would have been produced three years before by the shock of the death of his wife, than by the shock of the loss of his hogs, three months before?

A. Oh yes, one would have precedent for a good many months.

Q. And aen-emia is slow in its development is it not?

A. As a general thing. It may develope pretty rapidly in some few cases, for instance, in tuberculosis, sometimes one of the very first symptoms we may have this aen-emia. Of course they grow more aen-emic as it runs it- course, but aen-emia is ofttimes one of the very first symptoms prod-ced in tuberculosis, development of tuberculosis.

Q. In you judgment, your opinion, that we want, just your opinion in your judgment if he had been a healthy man in Novem-er, 1902 when his hogs died, and this financial trouble had come upon him would aen-*ima* have supervened from that cause alone, so rapidly as to have killed him three months afterwards, in February?

A. Well, aen-emia, as a general thing, has some other background; always some constitutional trouble, or some grave disease that interferes with assimilation, or with the functions of the different organs in the production -f the blood, and the sustaining of the blood there is always something behind it as — rule.

Recross-examination by Mr. RANDOLPH:

Q. I was interested in getting an a-swer to Mr. Brown's question as to whether or not aen-emia could be produced and run its course in the cou-se of three months, provided a man gave up hope, and lay down.

Mr. BROWN: Do not attribute that question to Mr. Brown.

210 Mr. RANDOLPH: I was adding that myself.

Q. Provided a man became aen-emic, became in a helpless and hopeless state of despondency.

A. It is rather unusual for a person to die with an aen-emia in so short a time, unless there is something very serious back of it.

Q. Such a thing can happen?

A. It might, but some grave disease to my mind, a cancerous condition, or a *terbu*coler condition, or a person having gone through a serious illness, typhoid, or typhus fever, running a long course, in which a high temperature would have broken down the general health of the patient to such an extent that health could not exist.

Q. The authorities I have named, say that in some case idiopathic

aen-emia may result fatally, almost immediately upon its taking hold of the system—is that true?

A. Not in my experience.

Q. Is that generally recognized by the medical profession?

A. Some authors teach it.

Q. There are extremes in all diseases?

A. Yes sir, there —.

Q. Some people will take down with typhoid fever, and die in 3 days won't they?

A. Well, it is very unusual.

Q. I know, but sometimes it produces a hemorrhage of the brain in a very few days after the disease is contracted, and the patient dies from it—have had such cases.

A. No, I don't believe I ever saw a case of typhoid fever die in my life with hemorrhage of the brain.

Q. Such are recorded?

A. It may be possible.

211 Q. But sometimes they die very quick, much quicker than others.

A. Yes, some run a long course.

Q. Some times tuberculosis will take hold, and run its course in a few months?

A. Yes.

Q. And other times it will run its course in 30 years?

A. Yes sir.

Q. And it is the same way with aen-emia, sometimes run a long course, the resistant powers are such, and the condition is such that it does not terminate fatally quickly, and other times it terminates quickly, especially if the person lies down in a hopeless despondent condition that would contribute largely to the hasty fatal termination?

A. Yes sir, it would.

Dr. ISAACS was next ca-led as a witness on behalf of defenda-ts and being sworn testified as follows:

Direct examination by Mr. HUBBARD:

Q. State your full name?

A. Geo. W. Isaacs.

Q. Where do you reside?

A. At Weatherby, De Kalb county, Mo.

Q. How long have you lived in Weatherby?

A. About 4 years, and a little bit more than 4.

Q. Where did you reside before you lived at Weatherby.

A. At Faucett, in Buchanan County, Mo.

Q. Did you practice medicine there?

A. I did.

Q. You are a regular graduated practitioner?

A. Yes sir, I am.

212 Q. Of some medical college?

A. Yes sir.

Q. How long have you practiced al- to*h*ether.
A. 12 years.
Q. Did you know Eber Roloson in his life time?
A. I did.
Q. When did you first become acquainted with him.
A. About the first of Feb. 1901.
Q. Had you known him by sight prior to that time?
A. I had known him for about 2 weeks prior to that time.
Q. That is, you had seen him about, and knew him when you saw him?
A. Yes sir, while I don't know that it is just exactly that time, but a few days before the first of February.
Q. You knew his name, and when you saw him you recognized him as Mr. Roloson?
A. Yes sir.
Q. What was the occasion of your first meeting him?
A. Well, I don't know whether I met Mr. Roloson, before he came to my office or not, I don't remember about that. The first time I might have met him prior to that, he came to my office about the first of February.
Q. For what purpose did he visit you doctor?
A. I said the first of February, I wish to correct that, it was about the 11th of February, I think.
Q. 1901?
A. 1901.
Q. What was the purpose of his visit to your offoce doctor?
A. The purpose of his visit was to have me examine him for life insurance.
Q. Then you were to make a physical examination of him?
A. Yes sir.
213 Q. And also to ask him questions concerning the history of his family, and himself, and his own condition, physically.
A. Yes sir.
Q. Did you do this?
A. I did.
Q. Was that on the 11th of February, 1901, or about that date?
A. About that time. I won't say just what day, but it was about that time.
Q. Was there any one else present when you made this examination?
A. I don't believe there was.
Q. Did any one come with him to your office?
A. Yes sir.
Q. And introduced him to you?
A. Yes sir.
Q. This is the first time you had ever spoken to him probably?
A. Well, I believe it was, I am not certain about that. I might have seen him o- the street, or at the store.
Q. You may state to the jury, what was his apparent physical condition as he came to your office that day, before you made a critical examination of him, what was his appearance as to health?

A. Well, his appearance was not good.

Q. Can you describe his general characteristics, and appearance?

A. Well, he was thin in flesh.

Q. Was he thin or emaciated? Is there any difference between the terms?

A. I would say he was emaciated somewhat*e*?

Q. What else did you notice in his condition looking him over?

A. Well, I noticed that his skin did not have a clear color.

Q. Did his skin appear healthy?

A. I can't say that it did.

214 Q. It was colorless, was it, bloodless you mean?

A. It seemed to be bloodless.

Q. What diseases, if any, or conditions, if any is that bloodless appearance of the skin characteris*cit* of—what do you call a patient who has a skin like that, such as you saw on him?

A. Well, I call it an unhealthy condition of the skin.

Q. Do you as a physician, ever speak of it as an a*e*n-emic condition?

A. Well, yes sir.

Q. Is that a word that is frequently used to describe the appearance of patients, or individuals who come under the view of doctors, they have an a*e*n-emic appearance?

A. Physicians use that *turn*.

Mr. RANDOLPH: I do not want to be captious, but I object to that question as leading.

The COURT: The questions of the counsel are very leading; see if you can not avoid it.

Q. What, if any thing else did you notice in his appe-rance, before you made his examination that day, besides being emaciated, or pale?

A. I noticed that he was slightly stooped; that is, weak. Was somewh-t unsteady.

Q. What was his appearance as to apparent vitality?

A. Well, I didn't think him a strong man at all, judging from his general appearance.

Q. After looking him over, you made an examination of him then, did you doctor?

A. I did.

Q. State to the jury, what that examination consisted of briefly.

A. It consisted of examination — him, examining differ-

215 ent organs of his body, taking his temperature, and pulse, the measurements of his chest, his height, weight, the constituents of the urine etc.

Mr. RANDOLPH: I want to ask this preliminary question as to whether or not — reduced this examination to writing; whether you made a w-itten report of this examination.

The WITNESS: I did.

Mr. RANDOLPH: Is this the report.

The COURT: That is not material, even if he did make a written report of it, it does not preclude his stating from his knowledge at this time, what occurred.

To which ruling of the Court plaintiffs at the time excepted.

Q. As to his temperature, what did you find, if you recollect?
A. On my first examination, I found that he had a certain amount of temperature, or fever.
Q. Then you examined him more than once?
A. Yes sir.
Q. On his first examination, did you find any disease, or unhealthy disease, that would account for that temperature?
A. Yes sir.
Q. State what it was.
A. Bronchitis.
Q. Did you get a history of the bronchitis from Mr. Roloson?
A. Yes sir.
Q. Did he state to you how long he had been suffering from it?
A. It seems to me like he said about 2 weeks.
Q. What stage did you find the bronchitis in?
A. I thought it was a chronic stage.

Q. You may state to the jury, whether bronchitis has any
216 connection with tuberculo-s trouble?

A. It does in a great number of cases.

Q. Did you get any history from Mr. Roloson, at that time of the cause of the death of his wife, of his nursing her during her last illness?
A. Yes sir.
Q. Did he state to you at that time, about when his wife died?
A. I believe he did.
Q. Do you remember about the time of her death?
A. I do not. I was not there at the time, and I don't re-ember the date.
Q. You may state from your examination, and the general appearance of the man, and the history that he gave you, whether you regarded him as a first class risk for life insurance at that time?

Objected to by plaintiffs.
Which objection was by the Court sustained.
To which ruling of the court defendants at the time excepted.

Q. Did you, at that examination, after that examination, immediately make out a report, or send in a report to the company?
A. No sir.
Q. You may state why you did not make such report.
A. I was not satisfied with his condition; did not think that I could pass him then.
Q. Was it, or was it not, your intention to have some subsequent examination.
A. It was.
Q. Did you have a subsequent examination?

A. I did.

217 Q. About when if you recollect?

A. I do not know just exactly the time, but I think in about 2 or 3 d-ys.

Q. He came to your office again, did he?

A. He did.

Q. Did you find any change in his physical condition in that time, at that second examination?

A. No sir, if I remember right, he remained about the same.

Q. As to temperature?

A. Yes sir.

Q. It was above normal then.

A. It was above normal yes sir.

Q. Did you see him again?

A. Yes sir, I saw him several times after that. He came to the office, I don't know just how often.

Q. You may state wh-ther or not, you ever returned a written medical examination to the company for whom you were examining Mr. Roloson, at that time?

A. I did.

Q. Did you accompany that examination, or not, with any further information by letter or otherwise?

A. I did.

Q. You may state if the w-itten examination you forwarded contained all the results of your examination or not?

A. Well, I will say that it did not.

Q. Was it contai*j*ed in your letter then?

A. Yes sir.

Q. Did you have any conversation, can you state whether or not Mr. Roloson, had any further conversation with you in relation to his examination for this insurance?

218 A. He did.

Q. At what time, and where?

A. He came to the office several times after I had examined him two or three different times inquiring about whether I had heard.

Q. Only state such conversation as had to deal with his physical condition, or his own statements as you remember, as regarded his physical condition.

A. I had several talks with him after that, concerning his physical condition.

Q. In any of these talks, did he make any statement in regard to his own opinion of his physical condition?

A. Well, I believe he did.

Q. You may state as near as you can what he said; the substance of what he said in regard to it.

A. Well, he thought that he was in a condition that I should pass him for life assurance.

Q. Did he say any thing relative to his condition at a later time, and with relation to what he desired of his life insurance.

A. He talked more or less about it every time he came in the office.

Q. Do you mean what he intended to do with his life insurance.

A. Yes sir.

Q. Did he say to you doctor, at any time, whether he tho-ght he was going to live long, or not?

A. After he had found out, or had reason to believe that I had re-

fused to recommend him for insurance, he came in the office one morning and appeared despondent, talked a while about it, and talked like he knew I had rejected him, or had the company
219 to reject him.

Mr. RANDOLPH: I think that is objectionable.

The COURT: Get down to the physical condition what he said about it.

A. If I understood the question he asked me the question, if he said any thing about what he was going to do with his life insurance.

Q. His reason, any physical reason?

A. He remarked one morning, t-at he felt sometimes like he would not live very long, and that it was his desire to leave his daughter Lucy——

Mr. RANDOLPH: We object to that.

The COURT: I think it has gone far enough: that last is stricken out; that about his daughter.

Q. You may state what you re-lied in answer to his statement that he felt sometimes as though he were not going to live long.

A. I told Mr. Roloson, that if I recommended him for insurance, I wanted him to live about 26 years.

Q. Why did you say that?

A. That was about his expectancy to live.

Q. He had about 26 years expectancy, according to the tables of life insurance?

A. If I remember right, yes.

Q. Now from all the examination you made of Mr. Roloson, physical examinations, what would you say of him, what you observed as to his way of bearing himself, what you saw of him, his walk, his general looks, state whether or not you found that he was in any diseased condition, determined that he was in a diseased condition or had that opinion.

A. I stated a moment ago that I thought he had bronchitis at the time.

220 Q. That was at the time of your first examination.

A. That was at the time of my last examination.

Q. So that the bronchitis remained during all the time he was under your observation?

A. Yes sir, each time that I examined him I found that he had bronchitis.

Q. Was it your opinion that he was suffering from any other possible diseas- at that time, which you intended to diagnose further?

A. Well, I though- the bronchitis might be dependent on some other trouble; might be only a symptom of some other trouble.

Q. What other trouble?

A. Of more serious lung disease.

Q. Did his appearance indicate any such disease, his general appearance?

A. Well, yes, I think it did.

Q. What examination if any, did you make to determine this, if you had him under further examination?

A. If I had had him under further observation I intended to have a microscopic examination of the Sputum made.

Q. Did you have opportunity to do that?

A. No sir, I did not—well I had an opportunity at one time, but I did not take advantage of it at that time?

Q. Why not?

A. Well, I was busy at the time, and thought I would put the matter off for a while, and examine him further.

Q. Is it necessary, doctor, to determine definitely whether he was suffering from tubercul*o*r trouble of the lungs, to make a microscopic examination of the sputum?

A. I believe it would be.

221 Q. You know of no other means of absolutely determining it, do you?

A. No sir.

Q. Is there any other means known to science that you know of of absolutely determining it?

A. No sir.

Q. Did Mr. Roloson, in his details of his history to you give you any history of his gastritis?

A. I asked him that question, and he replied, that he had had nothing except a dyspepsia, that he had had two or three attacks of dyspepsia.

Cross-examination by Mr. RANDOLPH:

Q. I show you a paper, dated Weatherby, Mo., Feb. 11th, 1901, signed G. W. Isaacs, Medical Examiner, and ask you if that is your signature, and if that is the report you made on that examination.

Mr. HUBBARD: That is objected to, if your Honor please, on the ground of incompetency, and not proper cross examination.

The COURT: I assume that it contains some statements that will modify his oral evidence. It is competent for that purpose; the objection is overruled.

To which ruling of the Court, defendants at the time excepted.

A. I believe that is my signature.

Q. Don't you know it is yours?

A. Yes sir.

Q. And that is your hand writing fills up this medical report here?

A. Yes sir.

The paper shown witness was marked by the stenographer plaintiff's exhibit "F."

222 Q. That examination was 2 years before the death of Eber B. Roloson?

A. I don't remember the date of his death, but that was made if I remember right, about the 11th. day of February, 1901.

Q. He died Feb. 28th., 1903. Do you remember that fact?

A. Yes sir.

Q. Did you attend to him in his last sickness?

A. I did not.

Q. Did you visit him at all in his last sickness?
A. No sir, I did not.
Q. Did you know who the attending physician was?
A. Yes sir.
Q. Who was it?
A. Doctor Lee.
Q. This gentleman sitting right here?
A. Yes sir.
Q. You never discovered any specific disease in Eber Roloson in your examination?
A. I discovered that he had bronchitis.
Q. That was a temporary attack wasn't it?
A. Well, I could not say that it was.
Q. Do you know whether it was or not?
A. I don't know what you mean by temporary.
Q. Whether chronic or acute.
A. I thought it was a chronic trouble.
Q. That was in the winter time?
A. Yes sir.
Q. At a season of the year when bronchial affections are prevalent
A. Yes sir.
Q. The strongest of men have bronchial affections at that season of the year, sometimes?
223 A. Yes sir.
Q. And you did not consider it unusual to find a man with bronchial troubles in February, did you?
A. No sir, I did not consider it unusual.
Q. Was that before or after you made this report that you discovered the bronchitis?
A. It was before I made the report.
Q. What was his temperature the first time you examined him.
A. Well, I don't remember exactly, it was a degree, or a degree and a half, or something like that above normal.
Q. About 99 was it?
A. Well, I would not like to state exactly, for I don't remember.
Q. Slightly above normal, was it?
A. If I remember rightly it was, more than a degree above normal.
Q. In your final examination though, his temperature was normal, wasn't it?
A. Well, according to the report there it was, but I would like to explain something concerning that report.
Q. Well wait a minute now, you may get that opportunity. You wrote a letter to the company didn't you?
A. I did.
Q. Stating his temperature was normal on your second examination?
A. No, I didn't write a letter, I don't believe I did, I don't remember.
Q. Now you know Dr. Lee don't you?
A. Yes sir.
Q. Do you remember about the time of these examinations, of

meeting Dr. Lee in the road that runs east and west on the south side of Weatherby?

A. No, I don't remember of it.

224 Q. Do you remember saying to Dr. Lee, asking him if he had examined Eber Roloson?

A. I don't remember of asking, or seeing him there?

Q. Do you remember telling him that you had examined him?

A. I remember of going to his office, and telling him that I had examined him.

Q. And didn't you in that conversation tell him you could not find a thing wrong with him?

A. I did not.

Q. You say you didn't tell him that?

A. No sir.

Q. Nor in the conversation in the road you say you didn't tell him you could not find a thing wrong with him?

A. I did not.

Q. His heart was all right wasn't it?

A. I don't remember just what condition his heart was in.

Q. This report you have is not true?

A. Well, there are some answers there that I want to explain.

Q. Well, is this report true or false?

Mr. HUBBARD: That is objected to in view of the fact that the witness, when interrogated in regard to that report, stated that the full report was made by that paper, and letter which he transmitted to the company, hence I think that question is not fair cross examination.

The COURT: I think it is proper cross examination.

To which ruling of the Court defendants at the tije excepted.

Q. Now doctor, state whether or not thus written statement of yours is true or false.

225 A. Well, there are questions answered yes there, I mean to say there are questions answered no that should be answered yes, but I followed the report up with a letter, stating my reasons at that time for answering them that way.

Q. Then you made a false report?

Mr. HUBBARD: I think that is improper examination and we object to it.

The COURT: I will sustain the objection to that.

Mr. RANDOLPH: I think we are entitled to ask these questions on cross examination.

The COURT: I have sustained the objection, and you can have an exception.

Q. Doctor, you may state whether or not, the answer to the question I shall read you is true or not. "If safely insurable do you consider the party a first class risk; a good risk, or only a fair risk? If other than first class, under remarks state why. Answer: Good."

Defendant objects.

The COURT: You may answer that question.

Mr. HUBBARD: The question is not complete.

The WITNESS: At that time I did not consider him good, but I intended to write the company the reason why I wrote that way at the earnest solicitation of Mr. Roloson, and the agent, knowing that if I did not write good or first class, that the company would refuse to issue the policy. I intended *and* follow that up saying "no."

Q. Dr. Isaacs, this medical report was not expected to be seen *my* the applicant, was it?

A. Yes sir, the agent and the applicant I think,——

Q. This private report of yours? Under the second signa-
226 ture, it was not expected that he would see that?

A. It was not expected that he would see it, but he saw it, that is why I answered a great many of those questions, just in order to please Mr. Rolos-n, as well as the agent.

Q. Now except for Mr. Roloson's appearance, his thinness, you were unable to find any thing wrong with him, except that you found bronchitis.

A. I found the bronchitis.

Q. And you found his heart all right.

A. Well, I don't remember of him having any heart trouble.

Q. And you found his lungs to be all right?

A. No sir, I dod not.

Q. Well, you don't report in your letter, or in any other way that there is any thing at all the matter with his lungs.

A. I don't believe that I did.

Q. You have never discovered any thing wrong with his lungs have you?

A. Bronchitis always affects the lungs more or less.

Q. The bronchial tubes are above the lungs are they not? They are the tubes that run to the lungs, the air passages to the lungs?

A. They are in and above the lungs.

Q. Now you don't mean to say that you found any thing wrong with his lungs?

A. I mean to say he had bronchitis; that his lungs were affected to a certain degree.

Q. Now if he had lung trouble it would have developed prior to his death?

A. I believe it would.

Q. It would have developed, and become noticeable. You did not mean in answer to Mr. Hubbard's question, that it required a
227 microscopic examination to determine whether or not a person had turbuculosis, that in all stages of it it required a microscopic examination, did you.

A. I meant to say there was no positive way of telling whether a bronchitis was simple or tuberculor without a microscopic examination.

Q. He was asking you about pulmonary trouble; about lung trouble.

A. Pulmonary tuberculosis.

Q. You can tell it positively without the aid of a microscope can't you in certain stages?

A. You can't tell it positively.

Q. It is only in its incipie-cy that you would need a microscope isn't it.

A. Well, in order to tell the exact nature of the trouble, it would be necessary to discover the germ causing the disease.

Q. Even in the last stages it would be necessary to use the microscope?

A. I should think, to make a positive diagnosis of the trouble it would.

Q. Are the lungs more or less clogged in tuberculosis of the lungs?

A. I think they are sir.

Q. There is a murmur, or wheezing?

A. Yes sir.

Q. A rushing sound in the air passages?

A. More or less murmuring.

Q. And that is the way you discover it, is it not ordinarily?

A. I discovered the bronchitis by——

Q. I am not talking to you about the bronchitis, I am talking to you about lung trouble. Is that the way you discover lung trouble?

A. Yes sir.

228 Q. Now if that bronchitis had been tuberculor, it would have been developed in 2 years, and would readily have been told wouldn't it? Or if it had been chronic it would have progressed in that time?

A. I believe it would.

Q. So it would have been noticeable?

A. Yes sir.

Q. Now doctor, on the back of this, under the head of "Examiners Remarks," I find somethi-g with your name to it. Is that your handwriting, and your signature?

A. It.is.

Q. I want to read this to you. It is short, and you may tell me whether it was a true statement or not. "My reason for not rating applicant first class (You rate him good instead of first class) is the probability of his sister's death from pulmonary trouble, and the age of his maternal grand father at death, judging from what applicant tells me, I am inclined to believe that the grip was probably a factor in causing the pulmonary tro-ble. G. W. Isaacs." And dated.

A. Well, I would say that I wrote a letter explaining that trouble.

Q. You wrote still explaining this?

A. I think I did.

Q. You don't answer my question. I want to know whether or not this is true that you wrote on this policy.

—. ——.

Q. I didn't ask you that. You already told me that. I want to know if it is true; is that the truth?

A. It was my intention to explain that——

Q. I want to know if this statement is true.

229 A. Well, I didn't believe that at the time I wrote it. I wrote it to please Mr. Roloson, and to please the agent.

Q. Now doctor, did you take his inspiration, and expiration?

A. Yes sir.

Q. Now is the truth as to his inspiration, and expiration stated in this report of yours.

A. I think that was about true.

Q. There was no reason why you should not have stated the truth about that?

A. No.

Q. You state that the measure*me*ment of the abdomen is 32 inches.

A. Yes sir.

Q. The measurement of the chest, under vest*m*, at inspiration—that is when he filled up?

A. Yes sir.

Q. Was 36 inches, and at expiration, 32½ inches.

A. Yes sir.

Q. That have him an expansion of 3½ inches did it not?

A. Yes sir.

Q. Now with tubercul*o*r trouble of the pulmonary organs the chest gets in such condition that there is very little change from inspiration to expiration.

A. It will get in that condition, yes sir.

Q. Now, for a man of Mr. Roloson's size, that was a very good ex*pp*a*s*ion wasn't it?

A. Yes sir, but expansion can be increased even in a diseased lung.

Q. Well, I don't understand why you make that remark. What about that.

A. The reason I make that remark is that some men, by practice can expand an inch or 2 more than they could ordinarily.

230 Q. Do you mean that as an insinuation that Mr. Roloson was practicing?

A. I should not be surprised if Mr. Roloson, had not been practicing expansion.

Q. He had such a good expansion you think he must have practiced.

A. Yes sir, it surprised me.

Q. He was about 53 was he at that time, 53 or 54 years old?

A. 50 odd years of age.

Q. Would have been 54 the following december? 53 at the nearest birthday at the time you examined him—did you weigh him?

A. No sir.

Q. Didn't put him on the scales?

A. No sir.

Q. But you certify here that his weight was 140.

A. Yes sir.

Q. Was that your honest estimate of his weight at that time?

A. I took Mr. Roloson's word for that entirely.

Q. What was your estimate of his weight?

A. I thought that was pretty close to his weight.

Q. You state in answer to the question as to what was his figure and general appearance, you state that he was erect. Is it true that he was erect?

A. Well, he was not exactly erect; he was slightly stooped.

Q. Only slightly?

A. And where a person is only slightly stooped I am not so particular about stating that they are erect.

Q. Why did you say he was erect?

A. Because Mr. Roloson was as desirous of having everything as favorable as possible.

Q. Did Mr. Roloson tell you to make that erect?

231 A. Well, I don't remember whether Mr. Roloson told me to make that erect or not.

Q. Do you mean to tell this jury that Mr. Roloson asked you to make a single false entry?

A. Mr. Roloson, like every one else, the majority of persons that ap-ly for life insurance——

Q. Answer my question; do you mean to tel- this jury that Eber B. Roloson asked you to make any false answer whatever?

A. No sir, he did not ask me to make any false answer.

Q. Now you state in this that his height was 5 feet and 8 inches; did you measure him?

A. Yes sir.

Q. And found that to be his correct height?

A. Yes sir.

Q. Now you were asked the question here, as to whether there was anything abnormal in the character of the respiration, and you say no, was that answer true.

A. I can't just say how his respiration was at that time, it was better at that time than at any previous time.

Q. His respiration means his breath?

A. I understand that.

Q. I want the jury to understand that is what it means, his breathing?

A. Yes sir.

Q. Now here is another question, "Is there any indication of disease, either acute or chronic, in the respiratory apparatus and your answer, "no" is that answer true?

A. Wel-, it was not exactly true according to his condition at that time.

Q. You state in the report that his pulse sitting is 72, and standing 74; is that statement true.

232 A. Well, I can't say about that, I don't remember just what his pulse was.

Q. Do you remember anything abnormal in his pulse at all?

A. No sir.

Q. Now 72 is a normal pulse isn't it, sitting?

A. Yes sir.

Q. And 74 is the normal pulse standing?

A. Yes sir.

Q. And a nervous person has a quicker pulse than a person who is not nervous?

A. Yes sir.

Q. Now as to the examination of the urine, you say clear, and specific gravity 10.24, reaction acid. Is that true?

A. Yes sir.
Q. That indicates a healthy state of the body does it not?
A. It appears to me like that was about the specific gravity.
Q. That indicates a healthy condition of the body does it not?
A. Yes sir, to a certain degree it does. Well they might have a specific gravity of 10.24, and be diseased.
Q. Would it be clear and acid,—there was no indication of disease in it?
A. There was no indication -f any albumen.
Q. Now you intended when you made that answer to be understood as saying that there was no disease, did you not?
A. I intended when I wrote that report out, I did not wish to offend Mr. Roloson, at the same time I did not believe that.
Q. Do you mean to be understood as statijg that the indications from the urine were healthy?
A. I don't remember just what condition the man's urine
233 was: I would not swear at the time I made the examination.
Q. Now then at that time, when this application was being taken, Mr. Roloson told you that he had had an attack of bilious fever in the Fall of 1900, didn't he, the previous fall?
A. Yes sir.
Q. He stated that he had had no disease with lasting trouble, and stated that in the Fall of 1900 he had had this attack of biliousness, and he was attended by Dr. C. O. Patton, of McFall, Mo. did he not, in the Fall of 1900, for biliousness?
A. Yes sir.
Q. Was there any other physician in Weatherby in February, 1901.
A. There was.
Q. Who was it.
A. Dr. Lee.
Q. Was there any other physician there?
A. Not that I know of.
Q. How far was it to another physician?
A. From Weatherby? I suppose about 9 miles to Maysville.
Q. Maysville is 8 miles isn't it?
A. Some cal- it 8 miles, and some 9.
Q. There were thre- or four physicians there?
A. Yes sir.
Q. How many physicians are there at Winston.
A. There are 2 physicians at Winston.
Q. How far is that.
A. I believe they call that about 7 or 8 miles.
Q. Now who asked you to make this examination?
A. Mr. Roloson asked me himself, and Mr. Walcott, I believe.
Q. Was Wolcott the agent for this company at that time?
A. I believe he was, to the best of my memory.
234 Q. Did he come to the office of Mr. Roloson?
A. I believe he did.
Q. He was the one that appointed you to examine for the company for that purpose?

A. I d-n't remember exactly, but it seems to me like he asked the company to appoint me the physician, but I am not positive about that.

Q. This is the same Dr. Lee that was there?

A. Yes sir, that is the same Dr. Lee.

Redirect examination by Mr. HUBBARD:

Q. In connection with the examination, we now offer in evidence exhibit F as part of the examination of Dr. Isaacs, together with exhibite G, H and I, being letters to the company, explanatory of exhibit F.

Mr. RANDOLPH: We object to the letters, for the reason that Mr. Roloson, was in no manner bound by them, and that Mr. Roloson took no part in the writing of these letters. If they were *ex parte* communications of this person to the company, and were no part of the report, and this is not the company that he was insured in, nor the company that is now on trial, and Mr. Rolos-n could be in no manner bound by these letters, and they contain no statements eminating from Mr. Roloson.

Adjournment was here taken until Friday morning following.

FRIDAY MORNING, *March 10th*, 1905.

The COURT: Touching the letters that were offered in evidence just before adjournment last night the plaintiff offered for the purpose of contradicting evidence given by Dr. Isaacs on the witness stand, certain statements made by him in his report to the insurance company. It was not simply the contradictory state-
235 ments but the document itself, their report, and it was sought to qualify the doctor's evidence by showing that he had made a report to the company for which he was acting, different in its tenor from evidence which he gave upon the witness stand. If it were sought simply to show that he had made contradictory statements in writing, possibly the letters would not be admissible, but the attempt of the plaintiffs is to show that the doctor made a report which was contrary to the evidence which he gave upon the stand, and when viewed in that light it appears that this Exhibit F is not the entire report which the doctor made to the company, that he accompanied that report by a letter which qualified and explained the report, and the defendant is entitled to the entire report which the doctor made at the time. I would therefore overrule the objection to the letter bearing date March 3rd, which was substantially contemporaneous with the report to the company. The subsequent letters are too remote, and deal to some extent with other matters entirely, and I will sustain the objection as to the letters dated March 27th and April 18th.

To which ruling of the Court defendant at the time excepted, and to which ruling of the Court plaintiffs at the time excepted.

The said paper marked Exhibit F is in words and figures following:

(Here follows Exhibit F, marked page 236.)

FOLD OUT IS TOO LARGE TO BE FILMED

I

For a Policy of $5000. Insurance
ble plan.

1. My full name is Eber B.Rolosor
County of De Kalb, State of Mi
2. My former residence was McFall
farmer and stock raiser. My I
supervising farming interests.
3. My place of busines (P.O.addre
4. I was born 23. day of Decembe
Send premium receipts for
by, Mo.
5. The full name of the person to
ciary,) is Miss Lucy N.Rolosor
6. The relationship of the Benefi
rance)is daughter.
7. The insurable interest,if othe
8. The preimum of the Policy appl
ly after the first year at the
9. I have been insured in this Co
I am now insured in the fol
amount and the year when insu
Assn $3000.-1897. Patomac Life
Mutual Reserve Fund $5000.1900
applicat will lapse the las
ved.
10. No Companies or Associations,t
Insurance have refused me on t
11. I have no application now pend
ration or Association, No.
Soliciting Agent and have beer
to make the insurance herein-a
proval by the Comany's Medical
I hereby agree that,If I

237 The said letter of March 3rd, as admitted by the Court, and marked Exhibit I, is in words and figures following:

"G. W. Isaacs, M. D., Physician and Surgeon.

WEATHERBY, Mo., *March 3rd*, 1901.

The State Life Insurance Co., Indianapolis, Ind.

GENTLEMEN: I thought I would write you a few lines in regard to the application of Eber Roloson for insurance in your company. I have re-examined him, and while I find him in a very good physical condition his temperature is 99 2/5, and his general appearance indicates a diseased condition. Therefore I think it best to postpone the issuance of Insurance to him for a while at least. Please consider this confidential and if you desire further information concerning him, I will gladly furnish the same.

Hoping to hear from you soon, I remain,

Yours truly, G. W. ISAACS, M. D."

Mr. HUBBARD: For the purpose of completing the offer may I make separate offers of these two letters?

The COURT: You may.

Mr. HUBBARD: We now offer in evidence Exhibit H., being a letter of Dr. G. E. Isaacs to the State Life Insurance Co. under date of March 27th, 1901.

Mr. RANDOLPH: We object for the reasons already stated.

The COURT: The objection is sustained.

To which action of the Court in sustaining said objection defendant excepted.

Said letter is in words and figures following:

238 "G. W. Isaacs, Physician and Surgeon.

Medical Examiner for the Phœnix Life Ins. Co., Fraternal Accident Association, Fidelity Mutual Life Ins. Co., State Life Ins. Co.

WEATHERBY, Mo., *March 27th*, 1901.

To State Life Ins. Co., Indianapolis, Ind.

GENTLEMEN: I thought I would write you a few lines in regard to the examination of Mr. Eber Roloson of this place for Ins. in your company and request you to appoint another physician to assist me in re-examining him. I am not satisfied as to his fitness for Ins—"especially" in the amount asked for and on account of his age, the slight rise in temperature at my last examination and an "apparent" change in his general appearance since my first examination prompts me to ask you for assistance in re-examining him before "finally" passing on his case.

There is but one other physician here (Dr. Lee) but any other you see fit to appoint will be agreeable to me. Hoping to hear from you, I remain,

Yours truly, G. W. ISAACS, M. D."

Mr. HUBBARD: Defendant now offers letter marked Exhibit G, from Dr. Isaacs to Allison Maxwell, M. D., Medical Director of the State Life Insurance Company, under date of April 18th, 1901.

To the introduction of which letter plaintiffs object for the reason already stated, which objection was by the Court sustained; to which ruling of the Court defendant at the time excepted.

Said letter is in words and figures following:

G. W. Isaacs, Physician and Surgeon.

Medical Examiner for the Phœnix Life Ins. Co., Fidelity Mutual Life Ins. Co., Fraternal Accident Association, State Life Insurance Co.

WEATHERBY, Mo., *April 18th*, 1901.

Allison Maxwell, M. D., Indianapolis, Ind.

DEAR DOCTOR: Replying to yours of March 29th, concerning examination of E. B. Roloson will say that I have re-examined
239 him, and find his pulse and temperature normal, but I think it best to postpone this case indefinitely. I have arrived at this conclusion after a thorough consideration of his case. While he is in good physical condition for a man of his age, there are other things I have taken into consideration in passing on his case. I trust you will consider this confidential as I do not want to make him an enemy.

Yours truly, G. W. ISAACS, M. D."

Dr. ISAACS was recalled to the stand and testified further as follows:

Redirect examination by Mr. HUBBARD:

Q. Can you state definitely who it was that brought Mr. Roloson to your office the first time for examination?

A. I don't believe that I can state definitely; it seems to me like it was Mr. Wolcott, but I am not positive about it.

Q. Can you state whether any one else at any of the visits that Mr. Roloson made to your office concerning the examination for this insurance was with him?

A. It appears to me like there was some one accompanied him to the office several times; one time in particular I believe Mr. De Hart was with him.

Q. In reply to the question upon cross examination, I believe you stated that Mr. Eber Roloson never asked you to make a false statement in the application. You may state now what, if any, conversation you had with Mr. Roloson, or with Mr. De Hart, or with any other party that was with Mr. Roloson, in his presence, in reference to passing him.

A. Well, about all that was said, Mr. Roloson was anxious to be passed, and his friends were anxious that he should get insurance.

Q. What friends, if any, made any such statement to you
240 in Mr. Roloson's presence?

A. Well, if my memory serves me right Mr. De Hart told me he would like to see Mr. Roloson get the insurance as a friend, and it seems to me like there was some one else.

Mr. RANDOLPH: We object to the statements of other parties. It would make no difference any way, because of the statute that has been cal-ed to the Court's attention. The statemen- of Mr. De Hart would not be competent, and we ask that his statements that his friends were anxious he should have insurance, be stricken out.

The motion is granted, as to Mr. De Hart, and the motion is granted as to the other parties also.

To which ruling of the Court defendant at the time excepted.

Mr. HUBBARD: With the Court's permission, I will read exh[illegible] I to the jury.

Mr. RANDOLPH: I would like to ask Dr. Isaacs a preliminary question before this letter is read.

The COURT: Very well.

Recross-examination by Mr. RANDOLPH:

Q. Did this letter of March 3rd., accompany the application to the company?

A. It did not. I gave the application on the examination there, to the agent, whoever he was. He wanted that, and this did not accompany that if my memoray serves me. I mailed it afterwards.

Q. You handed the application to the agent?

A. Yes sir.

Q. And then afterwards you sent the letter?

A. Afterwards I sent the letter.

Q. Did you send any previous letter to that—is that the
241 first letter you sent.

A. I don't believe that that is the first letter I sent; I am not positive about that.

Q. Y-u think you sent a letter previ-us to that do you?

A. I believe I did.

Q. You think you did?

A. Yes sir.

Q. Now this application is dated Feb. 11th., and the letter March 3rd.

A. Yes sir.

Q. And you think you sent a letter before that?

A. Yes sir.

Q. Have you a copy of that letter?

A. No sir.

Mr. RANDOLPH: We ask that this letter be excluded, on the ground that it is not the letter that accompanied the application.

The COURT: If there are any other letters they should be produced.

Redirect examination by Mr. HUBBARD:

Q. Have you any recollection of any other letter you sent to the company prior to March 3rd.

A. I have no positive recollection, but it seems from the reading of that that the insurance company had requested me to re-examine him. I had sent a report of some kind that he was not in a condition to be passed at that time, and asked for further time, but I am not positive about that, when it was sent.

Q. Can you state when this was given to the agent?

A. No sir, I do not know, it was sometime quite a while
242 after I first examined him.

Q. You will note on the endorsement of that, the date of Feb. 26th. as being the date when it was filed.

Mr. RANDOLPH: If the Court please, we object to his calling attention to endorsements made by others than himself on that application.

The COURT: Objection is overruled.

Q. As a matter of fact, Dr. Isaacs, did you, or did you not keep this medical examination in your office pending the different visits of Mr. Roloson for examination?

A. I did.

Q. Was the first visit contemporaneous with the dating that you made on the application at the botto-, Feb. 11th.

A. I can't be positive about that. That was no doubt the day that I examined him, and it appears to me that he had never come to the office before, but I won't be positive about that.

Q. Handing you now letters under date of March 27th., and April 18th., you may state if that he/ps you in determining whether you wrote a letter prior to the letter of March 3rd.

A. Well, I don't see any th-ng in these 2 letters that would refresh my memory any.

Mr. HUBBARD: We ask permission to read the letter now.

Mr. RANDOLPH: We ma-e this further objection, that the delivery of the application and medical report to the agen- was a delivery of it to the company, and unless it was at that time by the letter, also deliver-d to the same person, that a subsequent writing to the company would be incompetent.

Mr. HUBBARD: If there is any doubt of this, we have a deposition from the company to the effect that those three letters con-
243 stitute the entire correspondence, and showing the date of the receipt of them.

The COURT: I think upon that statement, I will overrule the objection.

To which ruling of the court Plaintiffs at the time excepted.

Which letter referred to was here read in evidence.

244 Q. You may state Dr. Isaacs, if you received a request from the company for further examination of Roloson?

A. I did.

Q. Did you make further examination.

A. I did.

Q. Did you furnish the company further information as to his condition.

Mr. RANDOLPH: We object to that and ask that it be stricken out on the ground that his correspondence with the company is incompetent to affect in any manner Mr. Roloson's physical condition.

The COURT: We have not got to that yet. I think these preliminary matters are competent. The objection is overruled for the present.

Q. What was the nature of your communication to the company in respect to Mr. Roloson as a risk, favorable or adverse.

Mr. RANDOLPH: We object to that. This is not the company that is not defendant in this suit.

The COURT: This objection is sustained.

To which ruling of the Court defendant at the time objected.

Q. Were your further communications to the company, oral or in writing.

Mr. RANDOLPH: We object for the same reason.

The COURT: Objection is overruled.

To which ruling of the Court, plaintiffs at the time excepted.

A. It was in writing.

Q. Addressed to whom do you recol-ect.

A. Addressed to the State Life Insurance Company, if my memory serves me right.

245 Q. Do you know the name of the medical director, or chief medical officer?

A. I believe Allison Maxwell is chief medical officer.

Q. Do you know whether you addressed any letters to him as medical director to the company respecting Mr. Roloson?

A. Yes, sir.

Q. I hand you a paper marked Exhibit H. You may state whether or not this letter was one of the communications to which you have referred.

A. It was.

Q. I hand you now the letter marked Exhibit G. You may state if this is another of the communications to which you have referred?

A. It is.

Mr. HUBBARD: At this time we desire to renew our offer of the introduction of Exhibit H.

Mr. RANDOLPH: We object for the same reason we have already stated.

The COURT: Objection is sustained.

To which ruling of the court, defendant at the time excepted:

246 Mr. HUBBARD: We also desire to renew our offer of the introduction in evidence of Exhibit G.

Mr. RANDOLPH: We make the same objection.

The COURT: Objection sustained.

To which ruling of the Court defendant at the time excepted.

The COURT:

247 Q. Dr. What is normal temperature?

The WITNESS: 98 3/5.

Recross-examination by Mr. RANDOLPH:

Q. Are those thermometers you take temperature with always regular?

A. You mean accurate?

Q. Do they always register correctly?

A. Some of them do not, no sir.

Q. After they have been used a while, don't they have a tendency to register high?

A. I don't know that it is, still I have had thermometers that registered too high, and have h-d them that registered too low.

Q. How can you tell whether they are registering correctly or not.

A. I usually have them tested. There is always a certificate with them.

Q. How often do you have your thermometers tested.

A. Well, there is always a certificate accompanying each thermometer. I usually get a standard thermometer.

Q. That is by the maker, the certificate?

A. Yes sir.

Q. That does not determine any thing, except they, the maker-say it is right. That -s al- the certificate amounts to?

A. I guess.

Q. After you have used them a while the tendency is to register high. They never have a tendency to register too low after they have been used a while?

A. I can't say. I would*d* not think that would have much affect on them.

Q. 98 3/4 is regular?

A. I didn't say that; I said 3/5.

248 Q. That is a little more than 98 1/2? You report this temperature as 99 1/2.

A. 99 2/5, something like that.

Q. You report just one degree above normal, is that right? In this letter it is one degree above normal, is that right?

A. If it is 99 2/5 it is not one degree above normal.

The COURT: He reports it 4/5 above normal.

Q. 4/5 of one degree above normal.

A. Yes sir.

Q. Now in fevers, the thermometer runs to 102 and up to 104.

A. Yes sir, in some cases.

Q. How much higher do they run?

A. Possibly up to 107 or 108, even 110 in some cases.

Q. That just indicates a slight heat, that 4/5 of a degree.

A. Yes, indicates a slight fever.

Q. Well, — is just a little more warmth in the body than is ordinary.

A. Well, I consider it fever.

Q. You consider anything a fever that is warmth above normal.

A. Yes sir.

Q. Now where do you take the temperature; from what part of the body.

A. We usual-y take it from the mouth.

Q. The fever might be purely local might it not—might be something about the mouth that made it warmer there than the average in the body.

A. It is possible.

Q. Such a thing might happen?

A. Yes sir.

Q. You examined him again, and found his temperature normal?

A. I examined him again, but I do not think I found his temperature normal. That report as sent there I did not use much
249 care in making that out, for I intended to accompany it by a letter explaining it. I don't know but what I found his temperature normal, once or twice, or about normal, but I don't remember just when it was. I examined him, took his temperature possibly a dozen times.

Q. And you think at some times you found it normal?

A. I don't know but what I have, but the most of the times he had fever.

Q. Is the temperature of every person, the same, the normal temperature of every person?

A. The normal temperature is just about the same; it might vary ¼ of a degree.

Q. It varies some in different people; just as the rate of the pulse is different in different healthy people.

A. I don't believe it would vary more than 1/5 of a degree.

Q. You take a strong full blooded person, and one with a superabundance of vitality, and then take a person that is merely an average of vitality, and would the person that had the superabundance of vitality, have a little higher temperature, ordinarily?

A. Well I never could see any difference.

Q. Now if a person had taken a brisk walk, a brisk exercise, and another person had been quietly seated in a cool place, there would be a difference in the temperature of the two persons?

A. Sometimes there is—violent exercise will cause a rise in temperature.

Q. Any thing that produces warmth in the body produces an increased temperature.

A. No, not any thing. I believe it is necessary that a per-
250 son exercise violently to increase their temperature.

Q. Do you mean if I sit in a room with a temperature of 100 Degree- or 120 degrees, as warm as I can stand it, and that another person who is on an average with me in physical make up, sits in a room with the thermometer at 40 degrees, each for a period of an hour say, would there be any difference in our temperatures if you took it by inserting the instrument in the mouth?

A. I don't believe there would be very much. The surrounding medium might change the thermometer some.

Q. You don't think one person's body would be heated, and the others chilled.

A. It is possible the body could become somewhat chilled, and at the same time the temperature internally be about the same?

Q. The temperature is the state of heat in the body?

A. Yes sir.

Mr. KERR: If the Court please, I now desire to offer in evidence the depositions of Paul S. Knowles, and Harvey L. Elsworth, taken pursuant to stipulations of the parties last week.

Mr. RANDOLPH: We object to the entire deposition on the grounds that it has no tendency to throw any light on any issue in this case, and it is not by an officer of a defendant company and has no reference to the insurance in litigation, and the further objection that it is for the purpose of showing the insurance had been declined, and that is not a proper issue in this case.

The COURT: Objection is sustained.

To which ruling of the Court defendant at the time excepted.

251 Mr. KERR: May it please the Court, we offer this for the purpose of showing——

The COURT: The objection to it is sustained, and it is not proper for you to state the contents of your deposition for the purpose of getting the evidence in in an indirect way.

Mr. KERR: Would the Court permit me to make this offer in writing, so I can get it in the record?

The COURT: Yes.

The said depositions so offered and excluded by the Court are in words and figures following:

252 *"Interrogatories to be Propounded to Witnesses in said Cause*

Interrogatory 1.

State your name, age, and place of residence.

Interrogatory 2.

Are you, or have you been at any time, connected with the State Life Insurance Company of Indianapolis, Indiana? If so, state when and in what capacity.

Interrogatory 3.

Did Eber B. Roloson, late of De Kalb County, Missouri, make application for insurance on his life in that company at some time in February, 1901? If so, please state the particulars of such application and identify and attach the same to this deposition, including such medical examination as was furnished in connection therewith.

Interrogatory 4.

Was said application finally accepted or rejected? State all particulars of the action of said company with reference thereto and identify and attach all correspondence thereto between said company

and any person or persons, including copies of letters written by or for the said insurance company and original letters from any physician who examined said Roloson with relation to any such insurance."

"PAUL S. KNOWLES, a witness called by said defendants, pursuant to said agreement, being by me first dulu sworn, as hereinafter certified, testified as follows:

In answer to Interrogatory number one, witness says:

Paul S. Knowles, age forty-one years, Indianapolis, Indiana.

In answer to interrogatory number two, witness says:

253 About seven and a half years. Since January 1st, 1901, in the office of the company as assistant secretary. The other time in the field.

In answer to Interrogatory number three, witness says:

He did, on February 11th, 1901. This application referred to was submitted by our agent, Mr. H. R. Ellsworth. I am unable to attach the original application to this deposition, as it is a rule of the company that it is a part of the record of the office and therefore cannot be allowed to leave the office permanently. I, however, attach a copy of the original application, which will give all necessary information with reference to the medical examination and so forth, and make it a part of my deposition, and mark it Exhibit A.

In answer to interrogatory number four, witness says:

The application of Mr. Roloson was received at the office and accepted by our medical department February 26th, 1901, and a few days subsequent our company received a letter dated March 3rd, 1901, from Doctor G. W. Isaacs, who made the original examination. On the information contained in the letter referred to this company reconsidered the application and although the policy had been written, but never delivered, it was recalled by telegram to the agent and the policy was returned to this office and never delivered and the application was finally declined on April 20th, 1901, after some further correspondence with Dr. Isaacs, as shown in copies of letters attached hereto, which I make a part of my deposition and mark Exhibit B, Exhibit C and Exhibit D."

The application and letters from Dr. Isaacs referred to in above deposition are the same as the application and three letters

254 hereinbefore set forth, marked "Exhibit F," "Exhibit G," "Exhibit H" and "Exhibit I," respectively.

HARVEY R. ELLSWORTH, a witness called by the defendant, pursuant to said agreement, being by me first duly sworn, as hereinafter certified, testified as follows:

In answer to interrogatory number one, witness says:

Harvey R. Ellsworth, age thirty-eight, residence Indianapolis, Indiana.

In answer to interrogatory number two, witness says:

I was during the month of February, 1901, in the capacity of district agent for a portion of Northern Missouri, including De Kalb County. I am not connected with the company at this time.

In answer to interrogatory number three witness says:

He did. He made application on the 11th day of February, 1901. The original application I now hold in my hand, but as the original is the property of the company and I am not authorized to attach it to my deposition, I attach a copy of the same hereto. The signature of Eber B. Roloson I recognize as being attached to the original application and my name is also signed in my handwriting as a witness and as agent. I will now attach a copy of said original application to my deposition and mark it Exhibit A.

In answer to interrogatory number four, witness says:

It was rejected."

255 Further cross-examination of the witness Dr. ISAACS, by Mr. RANDOLPH:

Q. Do you mean to say that Mr. Gene De Hart, this gentleman was ever in your office and talked with you about Eber B. Roloson getting life insurance?

A. I believe Mr. De Hart was. I believe he accompanied him.

Q. Was he ever in your office at any time pri-r to the death of Eber B. Roloson?

A. Yes sir, I believe he was.

Q. Do you say he was?

A. Yes sir, I believe I will say that he was.

256 Mr. WHITTEN was next called as a witness in behalf of the defendant and being first duly sworn testified as follows:

Direct examination by Mr. KERR:

Q. Your full name is M. N. Whitten?

A. Yes sir.

Q. Where do you live?

A. McFall, Gentry county.

Q. How long have you lived there?

A. Twenty-five years.

Q. Your business?

A. I am a farmer and stock shipper.

Q. And have you been engaged in that business for a great many years?

A. Yes sir.

Q. Did you know Eber B. Roloson?

A. Yes sir.

Q. When did you first become acquainted with him?

A. It has been quite a while, twenty-five years, I suppose.

Q. Will you please state to the jury the nature of your acquaintance with him?

A. Well, I have known him and had business, did business with him all my life more or less; in fact, he and I was in the mercantile business at one time there together as partners.

Q. That is how long since?

A. That must have been in about 1884 or 5, along there. He was only in a short time.

Q. Since that time what have you seen of him?

A. Well, I lived there quite a while and finally he went out on his farm south of town, and then went over there to Weatherby.

Q. From this time when you and he were in business together have you seen him frequently or otherwise?

257 A. Yes sir, I seen him quite frequently up until some year or two before he died, I didn't see much of him.

Q. Used to visit McFall frequently up to that time?

A. Yes sir, when he lived on the farm that was his trading point and after he went to Weatherby, of course some of his folks lived there and he was up there to see them quite frequently.

Q. And you used to meet him in Weatherby too?

A. Yes sir.

Q. And other places?

A. Yes sir.

Q. What was the physical condition of Mr. Roloson during the year 1900 and thereafter until his death?

A. Well, I don't know as to the years now.

Q. Do you remember then the time of Mrs. Roloson's death?

A. Yes.

Q. That was in the fall of 1899?

A. 1899—Well, I didn't see Mr. Roloson any more until sometime the next summer.

Q. That would be 1900?

A. Yes sir; I don't remember seeing him until sometime in the summer. I was down there shipping stock and seen Mr. Roloson. It was after his wife died; it was in the summer. I think his wife died in the fall or winter.

Q. Were you talking to him at that time?

A. Yes sir.

Q. Will you tell the jury what was his condition at that time as fully as you can? Describe his condition in your own words.

A. He was not feeling very well; in fact, I knew of him having a sick spell. He said he had never entirely gotten over that, but

258 was feeling some better, a little at the time.

Q. How did he act?

A. He just acted like he always did with the exception he looked as though, in fact, he said he was not feeling stout.

Q. Can you describe in any greater detail his appearance at that time?

A. No, I don't know as I can. I seen he looked pretty bad; looked to be in poor health at that time.

Q. Did you see him afterwards?

A. I don't remember whether I ever seen him any more after that or not, perhaps I did. I couldn't say positively except that I was not down in that part of the country much. I don't remember of seeing him in McFall. I may have did it but I don't remember.

Q. Now, up to the latter part of the year 1899 what was his business and how did he fill it?

A. Why, he had a farm there. He handled quite a good deal of stock, I guess, cattle and so on.

Q. Was he around much?

A. Yes sir, I think he was. When he was able he was right sma of a hustler.

Q. You say when he was able. Explain what you mean?

A. Well, of course when he—after this sick spell I didn't see hi around much after that; in fact, I don't remember when was the la time I did see him, but when he lived on his farm and I lived i McFall he was quite a hustler.

Q. Was he ever a vigorous man?

A. No sir. No sir; he wasn't very vigorous, he was rather on t thin order.

Q. Can you state how long it was between the time you sa
259 him in 1899 and the time you saw him in 1900, was it a ye or less or more or can you state?

A. Why, I seen him quite frequently along in 1899 I guess, cause I bought considerable stock around Weatherby. I seen hi almost every time he was there. He lived at Weatherby at that tin I seen him quite frequently and also when he was on his farm I w out in that part of the country.

Q. You continued buying stock all along as you used to?

A. Yes sir.

Q. After this time in 1900 you don't know whether you saw hi at all or not?

A. I can't remember the last time I did see him.

Q. What have you to say about the comparative physical co dition of Mr. Roloson in the summer of 1900, at the time you ha mentioned, and his physical condition a year before?

A. Well, he looked worse that he did the year before, considera

Q. Considerably worse. Did he look strong or feeble?

A. No sir; he didn't look strong. Never did look strong so a- that is concerned. He looked to have a worse color; it seemed didn't have any strength much.

Q. Is the condition which existed in 1900 as compared with *the* condition which existed a year before, something which mean to describe as attributable, in your opinion, to something m than the lapse of a year, that the increased age of a man by year?

A. Oh, I don't think that age would change him that much, sir.

Cross-examination by Mr. RANDOLPH:

Q. I understand you to say, Mr. Whitten, that Mr. Roloson t you he had a *seik* spell?

A. Yes sir.

260 Q. It was a bil*l*ious attack, wasn't it?

A. He didn't say. I think he said, he spoke something other about having grippe, or something along in the spring winter after his wife died.

Q. And hadn't entirely recovered?

A. No sir.

Q. You quit buying stock at Weatherby about that time?

A. I was there occasionally, but not so often along in the summer.
Q. You don't remember ever seeing him after that.
A. No sir; I don't remember.

Redirect examination by Mr. KERR:

Q. You say he spoke to you about having a sick spell sometime before?
A. Yes sir; sometime in the winter. In fact, I knew of his sickness.
Q. And this was some months after this sickness?
A. Yes sir, it was sometime in the summer. I know it was warm weather.
Q. And the sickness?
A. He was down there where I was weighing some hogs.
Q. And the sickness of which you spoke was the preceding winter?
A. Yes sir.

Mr. LOCKHART was next called as a witness in behalf of the defendant and being first duly sworn testified as follows:

Direct examination by Mr. KERR:

Q. Your full name is William?
A. Yes sir.
Q. And where do you live?
261 A. At Weatherby now.
Q. How long have you lived there?
A. Been there about six months this last time.
Q. Before that where did you live?
A. In Maysville a year. Before that on a farm three and a half miles southwest of Weatherby.
Q. Did you know Eber Roloson during his life time?
A. Yes sir, I knowed him.
Q. Can you say when you first became acquainted with him?
A. Well, after he moved to Weatherby.
Q. Do you remember the time of his moving to Weatherby?
A. No sir; not exactly.
Q. You became acquainted with him after he moved there?
A. Yes sir. I saw him before he moved but never got acquainted with him until he moved there.
Q. You had known him by sight before that?
A. Yes sir.
Q. Can you fix any more definitely the time when you did become acquainted with him?
A. No sir; I don't believe I can.
Q. Do you know whether it was before or after Mrs. Roloson's death?
A. I saw him before Mrs. Roloson's death.
Q. At Weatherby?
A. Yes sir.
Q. Then you had met him before her death?
A. Yes sir.

Q. At that time what was your business?

A. I was a farmer.

262 Q. Three and a half miles from Weatherby?

A. From Weatherby, yes sir.

Q. How long did you remain on a farm there?

A. Until about two years ago.

Q. During the time you lived on that farm were you in Weatherby often or seldom?

A. I was there pretty often.

Q. About how often would you say?

A. Some weeks once or twice a week, and sometimes not so often.

Q. Did you see much of Mr. Eber Roloson during the year 1900 and 1901?

A. Well, I don't know that I saw him there often. I would see him at De Hart & Riggs' store, and at Paul Riggs.

Q. He used to be around those stores when you were there?

A. Yes sir.

Q. When you speak of De Hart & Riggs do you mean the gentlemen here?

A. I mean Mr. De Hart and his partner Mr. Riggs. Mr. Paul Riggs had a different store.

Q. Will you describe to the jury in your own words how Mr. Roloson looked during the year 1900 and 1901? First, during the year 1900. That was the year following Mrs. Roloson's death. How did he look to you?

A. I don't know; he didn't look live a very stout man.

Q. What makes you say he didn't look like a stout man? What about his appearance and actions that makes you say that?

A. Well, his looks and the way he walked about, his actions, about all I know.

Q. What were those actions that made you thing that?

A. He didn't walk around like he had very muc*h* get-up or life about him. Then he was kind of bent over a little.

263 Q. How did he look?

A. He didn't look like a very stout man, kind of pale and thin.

Q. How did his condition and appearance then compare with his condition before Mrs. Roloson's death in the year 1899?

A. Why, I don't know as I could say so very much difference, he looked down and went down some in his flesh; he got thinner all the time.

Q. Did you see him later and during the year 1901 and 1902?

A. I seen him off and on up until he died ever once and a while.

Q. Did his health, *o*n your opinion, remain constant for the three years that he lived after his wife's death, or did it change?

A. After he had that sick spell he didn't look as well as before.

Q. After he had that sick spell he didn't look as well as before. What sick spell do you mean.

A. After his wife died.

Q. That was the winter or early winter after his wife died?

A. Yes sir.

Q. Comparing his health in the summer of 1900, the summer after this sick spell, with his health in the summer of 1902, what have you to say?
A. Well, I don't hardly know, but just the way he looked.
Q. Did he get better, worse, or remain the same?
A. I told you I didn't think he looked as well as he did.
Q. Didn't look as well as he did before he had that sickness?
A. No sir.
Q. But after that time how did his health get?
A. He looked like he went down from that on.
Q. He looked like he went down from that on. Did you observe whether he was in the habit of coughing or not?
264 A. Why, I don't know whether he did so much. He coughed occasionally I think.
Q. What sort of a cough was it he had?
A. Kind of a dry hacking cough.
Q. How did he act when he coughed? Describe in your own words.
A. I never paid so much attention to him. I just noticed he was coughing. I never noticed how he was acting.
Q. That is all you can say about his coughing?
A. Yes sir.

Cross-examination by Mr. RANDOLPH:

Q. Did you ever live in Weatherby, Mr. Lockhart?
A. Yes sir.
Q. When was it you lived in Weatherby?
A. Well, I was there to stay, it has been about a year and a half ago I was there a while but I never lived there before that.
Q. You never lived there before Mr. Roloson died?
A. No sir.
Q. How far was it you lived from there?
A. Three and a half miles.
Q. Between there and Maysville?
A. Yes sir.
Q. You worked in a livery stable at Maysville for sometime?
A. Yes sir.
Q. Are you a married man?
A. Have been.
Q. You are not living with your wife?
A. No sir.
Q. How old are you?
A. 25.
265 Q. And all you saw of Mr. Roloson was just when you happened to be in town?
A. Yes sir.
Q. And sometimes you were in a condition to see double, were you not.

Mr. KERR: Objected to as incompetent, irrelevant and immaterial.
The COURT: Objection sustained.

Q. I will ask him if he was often intoxicated when at Weatherby?

Mr. KERR: Same objection.

The COURT: Objection sustained. I think it should be directed to the times when he saw Mr. Roloson about which he has testified. To which ruling of the court the plaintiff at the time excepted.

Q. At those times when you saw Mr. Roloson were you not at some of the times intoxicated?

A. No sir, I don't think I was. I don't know.

Q. You don't know whether you were or not?

A. I know I was not.

Q. Were you intoxicated at any time you saw him?

A. I don't think I was.

Q. You just saw him on the street, didn't you?

A. I saw him on the street and standing in the stores. I heard people talking with him.

Q. You never had any intimate acquaintance with him?

A. I have talked to him.

Q. You had no intimate acquaintance with him?

A. No sir.

Q. You were not one of his friends?

A. No sir.

Q. He always in your observation was a spare man?

A. Yes sir.

266 Q. A thin man?

A. Yes sir.

Q. Do you remember he had a sick spell after his wife died?

A. Yes sir.

Q. And he then had a worroed and troubled look?

A. Yes sir.

Q. Kind of vacant and preoccupied look as though he was suffering on account of his wife's death?

A. I couldn't tell anything about that; just know the way he looked.

Q. He got over that sick spell?

A. Yes sir.

Q. And was up and around about as usual?

A. Yes sir; he didn't move around as he did before.

Q. He got up and around as usual?

A. Yes sir.

Q. And he conducted his business, didn't he?

A. I guess he did. I don't know so much about his business.

Q. You never saw him transacting business?

A. No sir.

Q. You saw him when he was at ease around town, not doing anything?

A. Yes sir.

Q. You generally came to town at night?

A. No sir, not particularly.

Q. At night or Saturday afternoon?

A. Not particularly. I hauled milk for the creamery and I was there about noon lots of days.

Q. You came by, and how long did you stop there?
A. An hour or two.
Q. The Creamery is a mile south?
267 A. Yes sir.
Q. And you lived southwest of there?
A. Yes sir.
Q. To get up there you came out of your way?
A. Yes sir.
Q. And you always stopped a little while and then went on?
A. Yes sir.
Q. Did you go to the creamery every day?
A. Yes sir.
Q. It was two miles extra driving to go around there wasn't it?
A. Yes sir.
Q. Now, about two years ago—three years ago—you were indicted for stealing in De Kalb county and plead guilty, were you not?

Mr. KERR: If he offers to show a conviction, it is all right.
Mr. RANDOLPH: I offer to show a conviction.

Q. You were indicted for stealing and plead guilty, were you not?
A. Yes sir.

Mrs. LAIRD was next called as a witness in behalf of the defendant and after being first duly sworn testified as follows:

Direct examination by Mr. KERR:

Q. Your name in full?
A. Cora Laird.
Q. Where do you live?
A. Linn county, Kansas.
Q. Where did you live in the years between 1891 and the year 1901?
A. Near Weatherby and in Weatherby.
Q. And in Weatherby?
A. Yes sir.
268 Q. During what year did you live in Weatherby?
A. 1900.
Q. Through all of that year?
A. Yes sir.
Q. And any part of the year afterward?
A. Until the first of March.
Q. March 1901?
A. Yes sir, I think so.
Q. Your husband's name is Willis Laird?
A. Yes sir.
Q. In what business were you engaged in Weatherby?
A. First we run a restaurant and then we went to the hotel.
Q. Did you know Eber Roloson?
A. Yes sir.
Q. Do you remember the time of Mrs. Roloson's death?
A. It was in the fall.

Q. Do you remember the occasion of it? I am not asking you to fix the exact time. You were told she died that fall?
A. Yes sir.
Q. Did Mr. Eber Roloson ever board with you?
A. Yes sir.
Q. In Weatherby?
A. Yes sir.
Q. Before or after Mrs. Roloson died?
A. After she died.
Q. How long a time did he continue boarding with you?
A. Why, I don't just remember, but two or three months, I think.
Q. He commenced soon after her death?
A. I don't remember just how long; it was not very long.
269 Q. It was two or three months after her death in November 1899 and the time you left there in 1901?
A. Yes sir.
Q. How frequently would you see him during the time he was boarding at your house?
A. He was there every day.
Q. Did he room and board with you?
A. Just meals.
Q. Just his meals. Will you describe to the jury, in your own way, how he looked and acted during that time?
A. He looked mighty bad, awful white and acted like he was awful weak; talked awful weak.
Q. Talked awful weak?
A. Yes sir.
Q. Can you tell us in more detail how he looked and acted?
A. He looked awful sickly like; he wasn't healthy at all.
Q. Do you know whether or not he coughed?
A. Yes sir.
Q. Frequently or seldom?
A. Tolerable frequent.
Q. What was the nature of the cough he had?
A. Dry hacking cough.
Q. And when he coughed did he act peculiarly?
A. Yes sir.
Q. Describe to the jury what he did?
A. His eyes would water and it seemed like he was kind of sick. That is the only way—I don't know just how. He would seem like he felt bad when he had the cough.
Q. What about his appetite?
A. He ate awful little. He didn't eat very much.
270 Q. Tell in your way how he ate and what he ate and how he disposed of what you cooked for him?
A. For breakfast he usually drank a glass of milk and had a couple of small pancakes. For dinner I don't remember. For supper he ate a little toast and drank milk.
Q. Did you use to have to cook specially for him or did he eat what the other boarders ate?
A. Sometimes he would call for something special.

Q. Was he able to eat his meals when ordered and cooked by you for him?
A. He ate a small amount; he didn't eat no big lot.
Q. And you think he lived in this fashion for about one month?
A. Yes sir, or more. I don't remember just how long.
Q. Had you known him before that time?
A. Yes sir.
Q. How long had you known him?
A. Well, about a year I think before that.
Q. What was your acquaintance with him before that?
A. He used to come to the restaurant when he lived out on the farm. He would come to town and come in the restaurant and get his meals, him and his brothers.
Q. You are speaking of him coming to eat at your restaurant before he moved in Weatherby?
A. Yes sir.
Q. You were in Weatherby before he came there?
A. Yes sir.
Q. How long a time did you know him before he moved to Weatherby?
A. I didn't know him but just a short time before he come to Weatherby. I don't know just how long.
271 Q. After he came to Weatherby and until the time of Mrs. Roloson's death, did you see him frequently or otherwise?
A. Yes sir; after he came to Weatherby, after he moved there, I seen him nearly every day, he would be in the restaurant.
Q. Can you compare his physical condition before Mrs. Roloson's death and during the time he was boarding with you?
A. Well, he looked a good deal worse when he boarded with us than he did when Mrs. Roloson was alive.
Q. And was that condition that you mentioned continuous after her death?
A. Yes sir; he looked about the same all the time.
Q. Until you moved away from there in the early part of 1901 in March?
A. Yes sir; we went to Oklahoma in March.
Q. Did he ever talk to you about his health or say anything about how he felt?
A. No sir.

Cross-examination by Mr. RANDOLPH:

Q. Mrs. Laird, you now live in Linn county, Kansas?
A. Yes sir.
Q. When did you arrive in St. Joseph?
A. Yesterday evening.
Q. You were subpoenaed?
A. Yes sir.
Q. Who subpoenaed you?
A. I was subpoenaed since I got here.
Q. How did you happen to come?

A. My husband telephoned for me.
Q. Linn county, Kansas is a way down below Kansas City?
A. Yes sir.
272 Q. Mound City is the county seat?
A. Yes sir.
—. Pleasanton is one of the towns in that county?
A. How far do you live from Pleasanton?
A. I don't know how far it is.
Q. What town do you live near?
A. Harlanville.
Q. Do you live in town?
A. No, in the country.
Q. Your husband telephoned for you to come up?
A. Yes sir.
Q. And you got here yesterday?
A. I got here last night.
Q. What months in the year did you keep hotel in Weatherby?
A. I don't remember.
Q. You remember when you left?
A. We left in March, a year after we ran the hotel.
Q. When did you begin keeping the hotel?
A. It was October or in the fall I think.
Q. After Mrs. Roloson died?
Q. We was in the hotel when Mrs. Roloson died.
Q. It was during the winter that Mr. Roloson boarded with yo
wasn't it?
A. Winter and fall.
Q. During the fall and early winter?
A. We went in in October and he didn't commence boarding f
a while after we went in the hotel.
Q. Shortly after his wife died?
A. Yes sir.
273 Q. You didn't wait on the table?
A. No sir.
Q. You stayed in the kitchen?
A. Yes sir.
Q. Your table was not served by carrying in side dishes to t
guests? You set everything on the table?
A. We carried side dishes.
Q. You never waited on the table?
A. I never remember of waiting on the table.
Q. You never stayed in the dining room when the guests w
eating?
A. No sir.
Q. Who did?
A. Myrtle Hunt.
Q. She is working in the hotel at Maysville?
A. I don't know where she is.
Q. Don't you know she is working at the Lythe House in M
ville right now?

Mr. Kerr: We object to the question as irrelevant, incompetent and immaterial.

The Court: Objection sustained.

Q. You say he drank milk?

A. Yes sir.

Q. He didn't drink coffee at all?

A. I don't remember nothing about his drinking coffee.

Q. Did he sometimes call for eggs?

A. Yes sir.

Q. He ate eggs, did he?

A. Once in a while he would call for eggs.

274 Q. And the traveling men would call for eggs and the other people who came in?

A. Yes sir.

Q. Whenever he ate and the girl brough- back the dishes could you recognize the dishes that were brought back as being his?

A. The girl would say he didn't eat nothing.

Q. You are not supposed to tell what other- said. You are supposed to tell of your own knowledge. Of your own knowledge, you don't know the dishes that went to him and came back, and you couldn't tell anything about it? Just a pile of dishes on the waiter?

A. I don't know.

Q. All you know is that a pile of dishes came back on a waiter, and you don't know who ate out of them? So as a matter of fact you don't know of your own knowledge whether he ate hearty or ate little?

A. I don't think he ate very much?

Q. Do you know from seeing him eat yourself? Extending during that period do you know whether he ate much or not?

A. I have seen him at the table when he ate. I never waited on the table.

Q. You never stayed in the dining room. You were cooking the most of those things that the guests came in and ordered and as soon as they did you went to work to cook the stuff? You were in the kitchen at meal times preparing the meals as guests came in, weren't you?

A. We usually got the meals all ready before they commenced coming in.

Q. Did you fill the side dishes?

A. I generally dished up.

275 Q. You didn't dish it all up at once?

A. No sir.

Q. Dished it up as the girl came in and called for it?

A. For orders, yes.

Q. Did you have anybody in the kitchen to help you?

A. Yes sir; I had a girl.

Q. What part of the work did she do?

A. Washed dishes and helped.

Q. Besides Myrtle Hunt did you have another girl?

A. Yes sir.

Q. Had one in there to help you and your place was in the kitchen at meal time?

A. Yes sir.

Q. Now, Mr. Roloson was generally the first person who arrived of a morning, wasn't he?

A. I don't remember that.

Q. Didn't he come often and wake you up?

A. I don't remember anything about that.

Q. So he could get out early and attend to his own business?

A. I don't think he came very early. I don't remember about it.

Q. You don't think he came early?

A. I don't think he did. I don't remember about it.

Q. You are the wife of Willis Laird, who testified here?

A. Yes sir.

Q. He was there at the hotel at the time wasn't he?

A. Yes sir.

Q. And who generally got up first at the hotel? You or Mr. Laird?

A. I generally got up first.

And Mr. Laird laid abed until he got ready to get up.

Q. Did Mr. Roloson come and wake up the house? Did you ever know him to do that?

276 A. No sir, I didn't.

Q. You think he never did?

A. No sir.

Q. You wouldn't say he was the earliest person at breakfast?

A. No sir: I would not.

Mr. KERR: The defendant now offers in evidence Exhibit J. which has just been submitted to the court.

Mr. RANDOLPH: The plaintiff objects for the reason that it is not a paper signed or prepared by Eber B. Roloson, and for the reason that its contents are incompetent in this case and constitute no defense, nor do they tend to constitute any defense in this case.

The COURT: Objection sustained.

Mr. KERR: We except.

Mr. KERR: Does that go to the substance of the offer or the form of it. If it is to the form, I want to offer other evidence.

The COURT: I think I will allow it to be shown to show how much insurance there was on this man's life at the time of his death when it was taken out. Unless you object to it upon the ground that the policies are not produced, probably the list would be as convenient an exhibit of it as anything that could be shown.

Mr. RANDOLPH: I will make the objections as the offers come. I would prefer to keep the record in that condition.

Mr. KERR: You wish to take up the time to offer the policies.

Mr. RANDOLPH: I wish to object as the evidence is offered. I have a right to do that.

The COURT: Objection overruled.

277 To which ruling of the Court plaintiffs at the time excepted.

THE COURT: I receive it simply as a memorandum to show the policies that were in force at the time of this man's death on his life.

Said paper was read to the jury and is in words and figures following:

278 WEATHERBY, Mo., *Apr.* 20, 1903.

Apr. 22 Rec'd.

Union Life Ins. Co., Indianapolis, Ind.

Below is a list of Ins. upon the life of the late Eber B. Roloson.
Northwestern Nat. Life Minneapolis Policy No. 53966, Nov. 21, 1901, $5,000.
Northwestern Nat. Life Minneapolis Policy No. 61071, May 14, 1902, 5000.
The Fidelity Mutual Life, Philadelphia Pa," No. 120038, Aug. 26, 1901, 5000.
The Safety Fund Life Association, Monroe City, No. 3427, June 26, 1897, 3000.
The Royal Union Mutual Des Moines Policy No. 12580, May 31" 1901 5000.
American Central Indianapolis Policy No. 3409, Aug. 6, 1902, 5000.
The Hartford Life, Hartford Conn. Policy No. 264478, April 1, 1901 5000.
Brotherhood of American Yoemen, Des Moines, Policy No. 34945, May 4, 1901, 1000.
Fraternal Home Hamilton Mo. Policy No. 1923 May 5, 1900 500.
Old Wayne Mutual Life Association Indianapolis No. 05522, Apr. 10, 1901 5000.
Union Life Policy No. 9669, June 16" 1902 5000.
The Fraternal Bond (Sick and Accident).
We certify above to be a full copy of all policies on life of E. B. Roloson.

PAUL RIGGS AND
EUGENE DE HART,
279 *Administrators Estate of Eber B. Roloson, Deceased.*

Subscribed and sworn to before me this 20th day of April, 1903.
CLARK S. PACKARD,
Notary Public.

Defendant then offered and introduced in evidence, against the objection of the plaintiff that the same were incompetent and irrelevant and constituted no defense in this case, and were not the act of Mr. Roloson, each of said policies of insurance described in said Exhibit.

280 MR. KERR: If the court please, the papers which we are now about to offer—I don't know whether under your practice—

Mr. RANDOLPH: I of course will admit that these are the files of the Probate Court. Whatever Judge Williams produces I will admit are the files, but we object to their competency.

Mr. KERR: These are the files of the proceedings in the estate of Eber B. Roloson, and we offer them, particularly the appraisal report and inventory of the property of the decedent and the claims which have been allowed, the proof showing their origin, title and amount for the purpose of showing the condition of the estate.

Mr. RANDOLPH: We object for the reason that the condition of the estate would not determine his condition at the time of the issuance of the policies, and for the general reason that it is incompetent, irrelevant and immaterial.

The COURT: The objection is sustained.

Mr. KERR: We except.

281 Defendant offers to prove by said papers that at the time of the death of Eber B. Roloson his liabilities were, to-wit, the sum of $22870.65, and his total assets (exclusive of the life insurance policies issued on his life after the first of the year 1901) were of the value of $13384.14.

Plaintiff objected on the ground that such evidence is incompetent, irrelevant and immaterial, which objection is sustained by the Court, to which ruling of the Court in sustaining said objection defendant at the time excepted.

Defendant further offers in evidence the will of Eber B. Roloson referred to in the petition in this case.

To which plaintiffs object on the ground that the same is incompetent, irrelevant and immaterial.

The Court sustains the objection.

To which ruling defendant excepts.

The said will is in words and figures following:

"I, Eber B. Roloson residing at the town of Weatherby County of De Kalb State of Missouri, being of sound mind and disposing memory, do make this my last will and testament.

(1) I want all of my debts paid without Probating, a list of which I will leave with my Brother Howard J. Roloson.

(2) I give devise and bequeath to my beloved Brother Cassius N. Roloson Two Thousand Dollars also Two Hundred Dollars
282 to be paid to him an-ualy as long as he lives the an-ual payment to begin in eight months after my death I also bequeath to his daughter Ermie Roloson One Thousand Dollars her father C. N. Roloson to have the use of it as long as he lives at the Death of Cassius N. Roloson the Two Thousand Dollars is to be equally divided between his daughters Maud and Ermie Roloson and if either one of the daughters die without Issue both the legacies will go to the other daughter and if both daughter Maud and Ermie die without bodily heirs, that is with issue both of the above legacies are to revert back to my Estate all the bond that shall be required to the fullfillmin of the above conditions is for Cassius N. and his wife Alice Roloson to sign it

(3) I give and bequeath two Thousand Dollars in trust to be in-

vested as he sees to their benefit to my beloved Brother Howard J. Roloson for the benefit of my deceas- Sister Mary Dell Taylor's daughters Anna & Allie Taylor I empower my brother Howard J. Roloson to use discretion for the sole benefit of the two daughters Anna & Allie Taylor and to be turned over to them divided equal-y and if one daughter dies the other daughter will get the others share or if both die without bodily heirs that is without Issue it shall revert to my Estate all the bond that is required for the fullfillment of the above conditions is for Howard J. and his wife Georgeanna Roloson to sign it

(4) I give and bequeath to my beloved Brother Howard J. Roloson two Thousan- Dollars to be used by him according to our agreement and when that agreement has been fullfilled the balance will go to him or his heirs the agreement is not to be attached to this will I give devise and bequeath to my Darling Daughter Lucy Mary Roloson all of the balance and Remainder of my Estate and
283 Property, both real and Personal and Mixed absolutely to be paid to her when she arrives at her majority, provided however that if she should die before or after her majority without bodily heirs that is without Issue what property that is left is to be divided as follows that the sum of one fifth of what is left to be equal-y divided share and share alike a..ong John R. Tull, Anna Tull, Ella T. Riggs, Kate Toothaker
that the income of one fifth to be equally divided between Rose H. Briorton and Cora V. Alexander and at their death it goes to my Brothers and Sisters or if they are dead to their bodily heirs names of Brothers and Sister to receive it are Sister Arabella Fielder Brothers Cassius N. Roloson, John H. Roloson and Howard J. Roloson
the above named Sister and Brothers or their bodily heirs are to receive the three fifth at the Death of my Daughter as stated above names of Sister and Brothers to receive the three fifth Arabella Fielder Cassius N. Roloson John H. Roloson and Howard J. Roloson

(6) I hereby appoint and constitute Paul Riggs and Eugene De Hart assisted by Howard J. Roloson the Executors of this my last will, and as I have the utmost confidence in their business integrity I Empower them to invest or loan the surplus money as their Judgment dictates.

(7) I hereby appoint Howard J. Roloson without bond but himself and wife Georgeanna Roloson assisted by Paul Riggs and Eugene De Hart as Guardeans of my daughter Lucy Mary Roloson but my said Daughter shall choose her home and Residence and all legitment Bills shall be paid for her maintanents
284 In witness whereof I, Eber B. Roloson have hereunto set my hand and affixed my seal at the town of Weatherby in County of De Kalb state of Missouri this the 27 day of Jan. 1903 and hereby publish and declare the same to be my last Will and Testament

EBER B. ROLOSON. [SEAL.]

The said Eber B. Roloson at the town of Weatherby on said 27 day of January A. D. 1903 signed and sealed this Instrument and Published and declared the same as and for his last Will and Testament, and we at his request and in his presence and in the presence of each other, have hereunto written our names as subscribing witnesses

JOHN W. RIGGS, JR.
HENRY R. HARPER.

285 Defendant now offers to further and properly qualify Dr. Isaacs and to prove by him that, to-wit, in the early Spring of 1901, Eber B. Roloson made application to the State Life Insurance Company of Indianapolis, Indiana, for a policy of $5000.00 of Insurance upon his life and said application was rejected because of the non-insurable condition of said Roloson, and he was long prior to the making of his application for the policy first issued in this case advised of said rejection and the reasons therefor. To this offer plaintiffs object on the grounds that it is incompetent, irrelevant and immaterial, and the Court duly sustains the objection.

To which ruling defendant excepts.

286 Mr. BROWN: I think the formal admission of the cause of Mr. Roloson's death is on the record that was made day before yesterday.

Mr. KERR: We understand the parties to admit that the cause of death was acn-emia.

The COURT: It is admitted in this case that the proofs of loss furnished by plaintiffs in this case show that Mr. Roloson died of progressive acn-emia.

Mr. LOCKHART was recalled in behalf of the defendant and testified as follows:

Direct examination by Mr. KERR:

Q. You said when you were on the stand before, Mr. Lockhart, that you had been convicted of some crime. I want to ask you what was that crime?

A. For stealing a buggy whip.

Cross-examination by Mr. RANDOLPH:

Q. Just one whip was it?

A. Yes sir.

Defendant rests.

287 Whereupon Plaintiffs to sustain the issues on their part offered the following evidence.

Plaintiffs' Testimony in Rebuttal.

Mr. WALCOTT was first called as a witness in behalf of Plaintiffs, and being duly sworn testified as follows:

Direct examination.

By Mr. RANDOLPH:

Q. Your name is S. A. Wolcott?
A. Yes sir.
Q. You reside at Plattsburg?
A. Yes sir.
Q. You are the soliciting agent of the defendant in this case?
A. Yes sir.
Q. You are their soliciting agent now?
A. Yes sir.
Q. And you were the soliciting agent who took the application of Mr. Eber B. Roloson for both of the policies that were issued to him and that are now in suit?
A. Yes sir.
Q. Now did you take the applications?
A. Yes sir.
Q. Now I want you Mr. Walcott, in your own words and way, to tell to the jury just how you came to meet Mr. Roloson, and just what happened and just what Mr. Roloson's appearance to you at that time was?

Mr. KERR: We object to the question as asked on the ground that it is incompetent, irrelevant and immaterial, on the ground that it should be confined to the physical appearance of Mr. Roloson.

The COURT: It is difficult to tell in advance what the earlier features of that question will develop, will deal with, just what happened, just how it came to take place. I will allow him to answer it; if anything immaterial comes out under the generality of that question I will strike it out.

To which ruling of the court defendant at the time excepted.

288 A. I was at Maysville, Mo., in November 1901. I started to go to Plattsburg, and we changed from the Rock Island at Weatherby to the road that goes to Plattsburg. I had a few moments to spare there, an hour or two; there was only one party in the town I was acquainted with and I called on him, Mr. Packard, in the bank, and while I was in conversation with him in a general way as an acquaintance Mr. Roloson came in to transact some business: just what the business was I don't know. I stepped back, and after he got through Mr. Packard introduced me to him, said nothing about what my business was, I gave them as a rule my card as a representative of a life insurance company—he says "I am carrying considerable insurance," and I asked him if he could be further interested. He said "I might look at your contract if you are here to-morrow." I was out looking for business so I remained over and showed him the contract the next day. His brother came to town——

Mr. KERR: If the Court please I renew my objection to this evidence in the form of an answer to that question, and I move to strike it out on that ground, as not bearing at all upon the issues in this case.

The COURT: I think if it is one of the preliminary negotiations leading up to the taking out of these policies that it may be received as a part of the *res gestæ*. The motion is denied.

To which ruling of the Court defendant at the time excepted.

A. (Continued) So I wrote two applications, one for Eber Roloson——

Q. It don't matter about his brother, only Eber B.

A. I wrote his application for $5000.00. I then inquired who the leading physician was and was referred to Dr. Lee, a gentleman whom I had never met, and went out to look for Dr. Lee after the application was written, and casually met the gentleman on
289 the street. I says "Pardon me, sir, do you reside here?" He says "Yes sir." I said "Could you point out Dr. Lee to me?" He says "I am Dr. Lee." I introduced myself and gave him the application and asked him to make the examination, which he did.

Q. Was that all you said to Dr. Lee?

A. That was about all at that time.

Q. And that was about all that took place between you and Mr. Roloson?

A. About all I remember.

Q. What was Mr. Roloson's appearance at that time?

A. He was a spare man, a man about five feet eight or nine inches or seven or eight, as near as I remember, would possibly weigh about 135 or 40 pounds. He was a lean spare man, he was not a fleshy, robust looking man, like a whole lot of people, but that make of man that was considered a very desirable risk for insurance.

Mr. KERR: I move to strike out the latter part of that on the ground that it is not responsive to the question, and he is not an expert.

The COURT: The motion is granted. He may state how this man appears. Strike out that part which refers to very desirable risk for insurance.

Q. Did he look like a well or a sick man?

A. Well man, as far as I could indicate.

Q. That was November 1901, that was the first policy?

A. Yes sir.

Q. The second policy was taken out in May 1902?

A. Yes sir.

Q. Now tell the jury about the time of the taking out of the
290 second policy?

A. Well, I left that town and came back in May and wrote him a second contract and wrote some other business there.

Q. How did you come to write it.

A. I told him that if he wanted to carry any more insurance he

could get in now before he was past the limit of 54, could get in under the 54 rate, and he decided to take another policy and I wrote it.
Q. What was his appearance as to health at that time?
A. About the same as before, as far as I could tell.
Q. Now at the time the first policy was taken out did he show you the other insurance policies he had?
A. I got every one of them listed, I mean on the application.
Q. What did they amount to?
A. $24,500.00.

Mr. KERR: I move to strike out that answer on the ground that it is incompetent and immaterial, and don't tend to show what insurance was in force at that time.
The COURT: The motion is denied.
To which ruling of the Court defendant at the time excepted.

Cross-examination by Mr. KERR:

Q. What bank was this you visited when you went to Weatherby?
A. Bank of Weatherby—only one bank there.
Q. Who was president of that bank do you know?
A. I won't be positive but I think Mr. Paul Riggs.
Q. Who was this man you saw in the bank?
A. Mr. Packard.
Q. What was his position?
A. I think Mr. Packard was cashier of the bank.
291 Q. Who was it went to this town with you?
A. To Weatherby?
Q. Yes.
A. I went there on the train from Maysville.
Q. I thought you went there with somebody?
A. No.
Q. Mr. Walcott, you were in financial straits at the time of the taking out of this first policy were you not?
A. I never was a wealthy man.
Q. Were you not at that time in peculiar financial straits?

Mr. RANDOLPH: If the Court please, it makes no difference whether he was rich or poor.
The objection is sustained.
To which ruling of the Court defendant at the time excepted.

Q. Do you remember what the premium was on this policy?
A. $130.20.
Q. What proportion of that were you to get if you succeeded in writing this risk?

Mr. RANDOLPH: We object to that question also.
The COURT: Objection sustained.
To which ruling of the Court defendant at the time excepted.

Dr. L. E. LEE was next called as a witness in behalf of plaintiffs, and being duly sworn testified as follows:

Direct examination by Mr. RANDOLPH:

Q. What is your profession?
A. The practice of medicine, and surgery.
Q. How long have you been practicing medicine?
A. Eight years the last of this month, last of March.
292 Q. Are you a regular graduate of a medical college?
A. Yes sir.
Q. Where have you spent your life?
A. I spent my life on the farm most of the time.
Q. Where?
A. Near Winston Missouri in Daviess County.
Q. And how far from Weatherby?
A. We call it about seven miles.
Q. How long have you been located at Weatherby?
A. It will have been eight years September of this year.
Q. You began your practice there did you?
A. I began at Gallatin, practiced at Gallatin six months, then came to Weatherby.
Q. Did you in his lifetime know Eber B. Rol-son?
A. I did.
Q. Where did he live at the time you knew him?
A. He lived at Weatherby.
Q. Did you have frequent opportunities of observing him?
A. I did.
Q. Did you ever attend him in sickness?
A. I believe my only attendance on him was during his last illness; he came to my office a few times I think to get some tablets and some things like that.
Q. Did you ever examine him for life insurance?
A. I did.
Q. How many times—I mean did you examine him for both policies in this company? The Northwestern?
A. Yes sir.
Q. How many time- did you examine him *all* altogether?
293 A. I don't know—don't remember.
Q. Did you examine him more times than twice?
A. I believe I did.
Q. Did you examine him in November 1901?
A. I don't remember whether I did or not, I don't remember the date.
Q. You may look at the medical report here for the purpose of fixing the date?
A. Yes sir, that is my signature.
Q. Is that the medical report you made?
A. Yes sir that is.
Q. That was what date?
A. 10th day of May, 1902.
Q. I want to know about the first one, the first one is what date?

See if you also examined him at that time and if that is your handwriting and signature?

A. It is.

Q. What is that date?

A. The 19th day of November, 1901.

Q. Now then doctor, on the 19th day of November, 1901, was Eber B. Roloson afflicted with any disease?

A. I don't know that he was.

Q. Well what is your opinion as to whether he was or not?

A. Well he was not.

Q. Now at the examination the 10th day of May 1902 was he afflicted with any disease?

A. No sir, no disease I was able to discover.

Q. Did he have tuberculosis at either of those times?

A. I was not able to discover it if he did.

294 Q. What do you say as to whether he did or did not.

A. There was no indication that would lead me to believe he had.

Q. As to aen-emia, progressive or pernicious aen-emia, did he have that disease at either of those times?

A. I don't know that he had any symptoms of those diseases at that time.

Q. What is your best judgment as to whether he did or did not?

A. I don't think he had.

Cross-examination by Mr. KERR:

Q. When did you move to Weatherby doctor?

A. In the Fall of 1907 I believe.

Q. And you have been there constantly since that time?

A. Yes sir.

Mr. RANDOLPH: I wish to ask him another question: Dr. Lee, do you remember in 1901, about the time that Dr. Isaacs examined him for the Indiana State Life, do you remember of meeting Dr. Isaacs and having a conversation with him with reference to Eber B. Roloson's appearance and health?

A. I don't remember whether that was in 1900 or not; it was in a Spring, I know.

Q. Was it about the time he had examined him?

A. I think so, yes sir. I know it was.

Mr. KERR: We object to that as incompetent, irrelevant and immaterial.

The COURT: I suppose it is asked for impeaching purposes.

Mr. RANDOLPH: Yes sir.

The COURT: That is not the proper way to ask an impeaching question. The proper way is to call his attention to the specific statement of the witness whom you wish to impeach.

295 Q. Did Dr. Isaacs tell you at that time words to this effect, that he had examined Eber B. Roloson and was unable to find anything the matter with him?

A. He did with this additional: Except his appearance.

Q. Now repeat his statement so that we will get it.

A. It will be almost necessary for me to repeat the entire conversation I believe.

Q. Well, perhaps the Court will permit that under the circumstances, to make it clear and intelligible.

The COURT: It depends on counsel on the other side.

Mr. KERR: I have no objection.

A. Dr. Isaacs was driving to the country one morning I believe it was in March——

Mr. KERR: Just the conversation.

A. I was going to town and Dr. Isaacs was driving to the country. He called me up to him; he was in a buggy; he told me he would like to speak to me a little bit about Eber Roloson. I came on up to the buggy, and he asked me if I had ever examined Eber Roloson for life insurance. I told him that I had. He asked me if I found anything wrong with his physical condition. I told him that I did not. I asked him then if he had examined him. I was confident that he had, because their agent Mr. Walcott had told me that he had——

The COURT: Just go ahead with the conversation.

I asked him if he could find anything wrong with him. No, he says, I examined him thoroughly and could find nothing wrong with his physical condition but his appearance was not very good, or something to that effect.

Cross-examination by Mr. KERR (continued):

296 Q. In connection with this same conversation, did not Dr. Isaacs say to you that he found him in such physical condition that after repeated examinations he had advised the State Life of Indiana to reject the application, and it was rejected, and he told Mr. Roloson of it?

A. I don't remember the conversation at all.

The COURT: What do you mean by that—you don't remember that remark?

The WITNESS: Yes sir, I don't remember that that was mentioned, anything in connection with that.

Q. You and he had a talk one day about Mr. Roloson's physical condition, didn't you?

A. Yes sir.

Q. Can you tell us when it was?

A. No sir.

Q. Can you tell what year?

A. You have reference to this one we speak of?

Q. This talk you have mentioned—can you tell us the year in which it was had?

A. If you can tell me the year in which Dr. Isaacs examined him.

Q. Dr. Isaacs examined him in the Spring of 1901, February 1901, and March, one of those months.

The COURT: February March and April.

Q. He examined him beginning on the 11th day of February and then following through until the middle of April of the year 1901. Now then with reference to that, can you tell us what was the date of the talk you had with Dr. Isaacs?

A. I believe it was in March.

Q. Was it while he was considering him there and investi-
297 gating the health of Mr. Roloson do you think?

A. I don't know.

Q. Do you know whether it was before or after he made his report to the company?

A. The original report?

Q. Yes.

A. I believe it was after.

Q. After he made the original report. Was it before or after he made his last report?

A. I don't know when he made his last report.

Q. He made his last report in April of the same year.

A. Well it was before then, because it was in March I am confident.

Q. Did he talk to you at that time about having examined him for a company?

A. He told me that he had.

Q. Did he mention the company?

A. I don't know that he did.

Q. Did he not state to you in that conversation that he was not satisfied to recommend him to the company?

A. I believe not.

Q. Did he say anything to that effect?

A. I don't remember that he did.

Q. Did he express any doubt as to whether he was a good risk that he should recommend in substance?

Mr. RANDOLPH: We insist that he ask him what he said, not what the effect was.

The COURT: This is cross-examination—proceed.

A. He said that his physical condition was good but his appear-
ance was not very good.

298 Q. Did he not tell you at that time that he had reported to the company to defer action on the application of Mr. Roloson until he could make another examination of him and report further?

A. I don't know that he did.

Q. Did he say anything about a further examination?

A. I think he did not at that time.

Q. What then was his purpose as he said to you of talking to you at that time?

A. I don't know his purpose.

Q. He didn't say he had a pending examination did he?

A. No sir.

Q. Just came to you and said I did examine Eber Roloson for a certain company and didn't find anything wrong but I want to know whether you think I was right or wrong?

A. He didn't say that.
Q. Did he ask you if you had examined him?
A. Yes sir.
Q. And what did you say?
A. I told him that I had.
Q. Did you say for what company?
A. I think not.
Q. What company was it?
A. I don't think he asked me.
Q. I ask you now what company was it which you had examined him before that time?
A. I don't remember; I think two or three companies.
Q. Will you please name them?
A. I have not looked up my notes.
Q. Have you any notes here which will refresh your memory so you can name them?
299 A. I have not.
Q. Then you want to be understood as saying that before that time you had examined him for some company, and you can't tell us what company?
A. I am not certain that I examined him for any company, but it is my belief that I did.
Q. And you have no idea what company it was?
A. No sir, I would not risk a statement.
Q. As a matter of fact did you ever examine him before the time you examined him at the request of Mr. Wolcott?
A. I really do not know, whether I did or not.
Q. You won't say that you ever did will you?
A. No sir.
Q. Do you remember the occasion of that examination?
A. Which examination?
Q. The examination, the first examination you made of him for Mr. Wolcott?
A. Yes sir, I believe I do.
Q. Do you remember where the examination was made?
A. I suppose it was in my office. I always make them there.
Q. I am asking you of your memory. Not your practice. Do you re--mber the particulars of that examination?
A. Wel-, I do not remember any thing particular about it, no sir.
Q. Do you have any recollection at the present time that you did make that examination, apart from the fact that a paper shown you indicates that you did?
A. I did not get your question.
Q. Apart from the fact that you have just been shown a paper which you signed, concerning the first examination of Mr.
300 Roloson apart from that. Have you any recollection of making the first examination?
A. Yes sir, I believe I do.
Q. Have you any recollection as to where the examination was

made? Not from your custom, but a personal present recollection of the fact of the examination?

A. I do not know that I just understand your question.

Q. Do you remember doctor that you did make that examination?

A. Yes sir.

Q. Do you rem--ber where it was made?

A. Wel-, I have no personal remembrance of it.

Q. That is what I am trying to get at.

A. Whether it occurred in my office or not.

Q. Do you remember the time of it?

A. I believe it was in the morning.

Q. What makes you think that?

A. Well, I think I told Mr. Wolcott, the evening before that I could not make the examination, that evening; that I could make it in the morning.

Q. That is the only thing that makes you think it was made in the morning?

A. Yes sir, and was made at the office.

Q. Do you keep any data of the medical examinations made by you for life insurance companies, or of patients—books of account?

A. I keep the name of the individual, and the company in which they are insured.

Q. In what form do you keep that.

A. I keep it in my day book.

Q. Have you a day book in your possession at the present
301 time, which shows your doings in the year 1901?

A. In regard to my practice, or medical examinations?

Q. Medical examinations.

A. I have not in my possession at the present time.

Q. Did you ever have such a book?

A. I have my regular day book.

Q. Did you ever have any book in which you kept any record of your medical examinations made for insurance companies?

A. I have kept a small book; I do not know that I have inserted the names of all the companies, or examinations in it, or not, and at the present time I do not know where it is.

Q. When you examined Eber Roloson, did you mark down on any book the fact that you examined him on that date?

A. I do not remember that I did; I suppose I did.

Q. Do you remember me asking you in the spring of 1903, concerning that examination?

A. I do not recall it at the present time.

Q. Do you remember a visit I made to your office on the 4th. day of May, 1903.

A. Is your name Kerr?

Q. Yes sir.

A. Well, I do not remember that it was that date.

Q. You remember that I did make a visit to you some time that spring then, don't you?

A. I remember you made a visit to me at my office, but do not remember whether it was in the spring or fall.

Q. Didn't I ask you at that time, whether you had any books of account, or records of any kind that would show, when you examined Mr. Roloson, and you said, didn't you answer that
302 you never kept a scratch concerning any of these medical examination-.

A. I don't know that I did; I don't think I did, don't think I would make it in that way any way.

Q. Can you, at the present time, produce before this jury, any book of any kind that will show us that you examined Eber Roloson on the designated day in August, 1901, or which will contain an entry to that effect?

A. I don't know that I can; I may have a note of it in my day book, and I may not have inserted it.

Q. Is that day book accessible to you—can you produce it in Court.

A. I think I could; I am not certain.

Q. Did you weigh Mr. Roloson on the time of this first examination?

A. I believe I did not weigh him; I don't remember.

Q. Are you in the practice of taking people's estimates of their own weights, instead of verifying it.

A. Yes sir.

Q. Is that common practice?

A. Optional with physicians I believe.

Q. Did you measure him?

A. Yes sir in regard to his height.

Q. Yes.

A. I am not certain that I did; I believe I did.

Q. You had in your office at that time, posted up against the wall, a device for getting the exact measurements of people?

A. If I did not at that time, I did soon after.

Q. Isn't it your best recollection that you did at that time?

A. I do not remember.

Q. Was it your practice to take measurements?

303 A. It was.

Q. And is your best recollection that you did or did not take a measurement of Eber Roloson on this date?

A. I do not remember whether I did or not.

Q. You have no recollection concerning it?

A. Not at present.

Q. You are acquainted with Howard Roloson are you not?

A. I am.

Q. You have made medical examinations of him.

Mr. RANDOLPH: We object to any medical examination of Howard Roloson.

The COURT: I do not see its competency.

Mr. KERR: It is preliminary. I am not going into his physical condition.

Q. You have made medical examinations of him?

A. I do not know whether I have, or whether I made just one.

Q. You made at least one?

A. Yes sir.

Q. What was the height of Eber Roloson, as compared with the height of Howard Roloson—you know the two men quite well?

A. Yes sir. I don't know whether I would be able to state or not.

Q. Were they of the same height doctor, or was one taller than the other?

A. I don't believe there was much difference in their heights.

Q. On the occasion of the visit which I made to your office, and which you have mentioned, did you not state to Henry C. Smith and myself, that Eber Roloson was an inch to an inch and a half taller than Howard?

A. I do not know; I may have made that statement.

304 Q. Is that not your recollection of the facts?

A. It is not.

Q. Is it your recollection that they were the same height.

A. I did not say that; there may have been an inch or 2 difference in their height; I am not a very close observer in matters of that kind.

Q. What is your best recollection, that there was, or was not, any difference in their heights?

A. Well, I am unable to state.

Q. Was not Eber Roloson a taller man that Howard Roloson, in your judgment?

A. Well, I don't know.

Q. Has any thing come to you since I asked the question before, which will enable you to now state whether you have examined Eber Roloson, before you examined him at the request of Mr. Wolcott?

A. No sir.

Q. Nothing has come to your knowledge?

A. No sir.

Q. And you can not be any more specific as to whether you did examine him before that time or not?

A. No sir.

Q. At the time of this conversation with Dr. Isaacs, did Dr. Isaacs not say to you in substance, that he had made an examination of Eber Roloson, for the State Life Insurance Company and had advised the company to postpone the application, and had made a subsequent examination and found that he had a continuous fever for a month, and had advised the company to reject the application and it had been rejected, and say to you: "now I want to know what you think about it."

305 A. We had a conversation after the one we spoke of a while ago—I believe it was at my office.

Q. I understood you to say there was only one conversation.

A. At that time.

Q. In March was it—one conversation in March, and another when——

Mr. RANDOLPH: We object to any thing concerning that conversation as that was not brought out. This was for the purpose of impeachment.

The COURT: I think I will allow the whole conversation on this same subject to be developed.

To which ruling of the Court, Plaintiffs at the time excepted.

Q. Can you fix the date of the second conversation?

A. I can not.

Q. Was it before or after the conversation you mention, when you walked up to his buggy wheel?

A. I am unable to say whether it was or not; I believe it was after.

Q. You believe hat at the time he visited you in your office was after the time you had the conversation while he was in the buggy?

A. That is my belief, but I am unable to say.

Q. How did he come to visit your office, do you know?

A. No sir, I do not.

Q. Did you talk at that time about Eber Roloso-?

A. Yes sir, I believe we did; I believe he came to my office since my memory has been refreshed, and said something about having another physician examines him, but what the substance of that conversation was I do not know.

306 Q. Did he at that time state to you, that he had advised the company — have another physician examine in connection with him, and had asked them to have you make the examination with him—is that a fact?

A. There was something of that nature, but whether that is specific or not, I do not know; that is, just what you asked me.

Q. Now wil- you say that the talk about you assisting in examining was at your first or second talk?

A. I am not certain; I think it was the second.

Q. And what is your judgment as to the time it took place, between the first and second talks.

A. I could not state.

Q. Did you at that time, say any thing about having ever examined Mr. Roloson?

A. I do not know that I did or not.

Q. Is not your best recollection that you did not?

A. I don't remember.

Q. Did you have a third conversation with Dr. Isaacs about the examination.

A. I do not remember that I did.

Q. Do you remember having any m-re than two?

A. No.

Q. At one of those conversations, did Dr. Isaacs not say to you that he had completed another examination of Mr. Roloson for the State Life Insurance Company, at the second of the conversations did he not state that he had completed another examination?

A. I don't know that he did.

Q. Or made another examination?

A. I don't know that he did.

307 Q. Did he not at the latter of those conversations with you state to you that he had finally come to the conclusion that Mr. Roloson was in bad physical health, and had advised the company to reject him, and it had done so?

A. I do not remember.
Q. Or words to that effect?
A. No sir, I do not think he did.
Q. Will you say he did not so state to you?
A. I could not state.
Q. You won't say that to that you did not answer that you would have done the same thing?
A. I do not remember.
Q. Will you say you did not?
A. I could not say I did not say it——
Q. Then you want to be understood that you will not now state that you did not then say that you would have rejected Mr. Roloson if you were examining him—do you want the jury to understand that you do not deny saying that?
A. I do not remember of saying it.
Q. On your oath, you will not say you did not make that statement will you?
A. I could not.
Q. Did you and Eber Roloson belong to any fraternal organization together?
A. I do not know that we did; I don't know whether Eber Roloson was an Odd Fellow or not—you mean fraternal Insurance Company?
Q. Yes sir.
A. I don't know that we did.
Q. You don't know that you did—do you know a gentleman called Tom Smith, a farmer who lives some six miles north east of Weatherby?
308 A. Yes sir.
Q. Do you and he belong to any fraternal insurance organization together, or did you?
A. If he is still keeping up his Fraternal Home insurance, we are.
Q. You had insurance in that did you not?
A. I have insurance in that now.
Q. And you took it out when?
A. I don't remember.
Q. In the year 1899, was it not, or 1900?
A. I don't know.
Q. Have you ever been an examiner for that Order?
A. For the Fraternal Home?
Q. Yes.
A. I believe I have a commission with them now.
Q. Do you remember the date of that commission?
A. I do not.
Q. Who was examiner before you—was it not Dr. Baker?
A. I don't know.
Q. Is not your recollection that it was Dr. Baker?
A. It may have been, I don't rememebr when the Lodge was organized there. It is customary to appoint 2 sometimes in Fraternal Orders.
Q. Prior to your appointment as medical examiner, Mr. Roloson was admitted to that organization, and got insurance in it did he not?

A. I don't remember the date of my *sin*urance, and do not remember the date of Mr. Roloson's.

Q. He got his insurance in May, 1900.

A. I suppose the date of the policy would show the date of the application.

Q. Can you tell us the date when you got yours?

309 A. I don't know, no sir.

Q. You knew Mr. Roloson did have insurance there, and did know when it was taken out?

A. I suppose I was told that as a part of the original application.

Q. About the time this policy was issued on the life of Eber B. Roloson, did you not state to Mr. Smith, concerning a conversation had by you with him, that you did not see how any one ever passed Eber Roloson—that if you had been examiner you would have turned him down?

A. I did not make such a statement that I know of.

Q. N-r in substance?

A. No sir.

Q. Did you ever visit Mr. Smith's house?

A. Yes sir, I am his family physician.

Q. Did you ever have any conversation with him at his house about the month of May, 1901, in which Eber Roloson was discussed?

A. I don't know whether it was in 1900 that he took out his insurance, was it.

Q. Yes sir.

A. Well, I have no remembrance of it.

Q. Did you in the spring of that year, have such a conversation with Mr. Smith at his house?

A. Wh-ch conversation do you have reference to?

Q. Concerning a medical examination of Mr. Roloson, and that you would have turned him down if you had been medical examiner?

A. No sir.

Q. Nor at any other time and place, doctor?

A. No sir, I don't remember.

Q. Do you know David Groomer?

A. Yes sir.

310 Q. How long have you known him?

A. I don't remember whether I was there at Weatherby when he was there, whether he was there when I came there or not.

Q. You knew during the spring of 1901, that Mr. Roloson was trying to get a lot of insurance didn't you?

A. I don't know that he was.

Q. You did not then know?

A. No sir.

Q. You knew about his trying to get this through in the State Life didn't you?

A. I knew about him being examined by Dr. Isaacs.

Q. And you knew it was for life insurance didn't you?

A. Yes sir.

Q. Do you know who was the agent in that case?

A. I believe Mr. Wolcott was.
Q. And that was in February, 1901,—do you know an insurance agent named Hall?
A. Yes sir, I knew of him.
Q. H-w long have you known him?
A. I have not seen him for years.
Q. Did you see him during the year 1901?
A. I do not know.
Q. Did you know him at that time?
A. I do not remember what year I saw him in.
Q. Was it not about the same time that you learned that some person was trying to insure Mr. Roloson in the State Life of Indiana?
A. I do not know of any incidence in connection with it.
Q. Did you have any correspondence with this insurance agent Hall about his getting insurance for Eber Roloson?

A. I do not know that I did.

311 Q. Will you say you did not have?

A. I could not say I did not have, because I don't remember.
Q. Did you ever talk to the man about Eber Roloson.
—. ——.
A. Did you ever make an examination of Eber Roloson for him?
A. I don't remember whether I did or not.
Q. Can you state n-w how many examination- of Eber Roloson you ever did make?
A. No sir, I could not.
Q. Did you make any more than you have identified in this case?
A. It seems to me that I have.
Q. What other doctor was there in Weatherby during the year 1901?
A. I don't remember whether Dr. Baker was there or not at that time.
Q. Well, as Dr. Baker had gone away, you were the only one?
A. There was a Dr. Robinson, came to Weatherby after Baker left, if I am not mistaken.
Q. Do you remember at what time he came?
A. No sir.
Q. How long did he stay?
A. I think he stayed possibly a couple of months?
Q. And then he went away?
A. Yes sir.
Q. That left you in undisputed control of the field?
A. I was there alone for a while, I do not remember how long.
Q. How old are you now?
A. 32.
Q. And when did you begin practice in Weatherby?
A. I think I made the statement before it will be 8 years ago this Fall.

Q. In the spring of 1901, doctor, did you not have a con-

312 versation with David Groomer, whom I have mentioned, in which you told him concerning Mr. Roloson's trying to get

insurance, that he was not a good risk, but you would pass him as you were a young man and needed the business, that the company would never see the applicant and could only take the physician's statement for it.

A. I made no such statement.

Q. Nor words to that effect?

A. No sir.

Q. Did you ever have any conversation of that nature with Mr. Groomer?

A. No sir, not of that nature.

Q. Nor concerning the physical condition of Mr. Roloson?

A. Well, I don't know.

Q. Did you ever talk to him about Roloson?

Mr. RANDOLPH: I think he ought to confine it to some time or place, instead of asking the general question.

The COURT: He can find out whether he ever talked with this man. I suppose if he remembers; it is a very general question; he will not be expected to have as good a memory as if the question were specific.

Q. Did you ever have a talk with him about Mr. Roloson's health?

A. I don't remember whether I did or not; I don't remember whether Mr. Groomer was living at Weatherby at the time of Mr. Roloson's last sickness.

Q. Assuming that he was living in Weatherby during the year 1901, for the evidence shows that he was, did you have a talk with him during that year in which you and he discussed the question of Mr. Roloson's health.

A. I do not remember that we did.

Q. Do you now have any recollection of ever talking to
313 Mr. Groomer about Mr. Roloson's health?

A. No sir.

Q. You had been acquainted with Eber Roloson some time prior to making this first examination hadn't you?

A. Yes sir, I believe I had.

Q. Can you state how long you had known him?

A. Wel-, I don't remember.

Q. Had you known him before he came to Weatherby?

A. I suppose I saw him before he came to Weatherby; I don't remember though.

Q. Was he a frail looking man, or a strong looking man, doctor.

A. He was neither, I believe.

Q. Then what would you say, if he was not frail, and not strong, you would just say he was weak in some parts? Is that what you mean?

A. No sir. He was a man of average strength I think.

Q. What was his color?

A. Well, it would be rather hard to describe his color. He was rather fair; seemed, of thin skin.

Q. Was he a man of swarthy complexion, or pale complexion, or sallow complexion.

A. He was fair complected I think.
Q. Then he was not sallow?
A. No sir, not what I would cal- sallow complected.
Q. Was he what you would call a normally strong, and normally vigorous man for his years?
A. Yes sir.
Q. That is your opinion?
A. For his years, yes sir.

Q. He was how old at that time—about 53 as you have
314 stated here I suppose. Did he look any older than that?

A. No sir, I believe he did not.
Q. Just lo-ked his age, according to your best recollection?
A. Yes.
Q. Now you had been living there before Mrs. Roloson died, did not you?
A. Yes sir.
Q. And you knew of her death?
A. I understood you to say Mr. Roloson?
Q. Mrs. Roloson.
A. Yes sir.
Q. And you knew of the sickness which he had afterwards, didn't you?
A. I knew of it by hearing of it.
Q. He was living there in Weatherby wasn't he at the time he had that sickness?
A. Yes sir.
Q. And you were living in Weatherby at that time?
A. Yes sir.
Q. And you and he belonged to the same fraternal Home Insurance Company, and to some Odd Fellows Lodge?
A. I don't remember whether he was an Odd Fellow or not.
Q. You were, were you not at that time?
A. Yes sir, I was.
Q. And is it not a fact to your own knowledge, your Lodge sent Fred Laird there to nurse him during that sickness?
A. I don't know that it did; I did not attend Lodge very regularly.
Q. At all events, you knew of his sickness—why did'nt you tell the Insurance Company about that sickness?

315 A. I don't know that came in the application. Was that question answered?
Q. Did you fill out the answer to this?

Mr. RANDOLPH: I want to make the point right here that our Statutes makes the medical examiners the agent of the company and any knowledge of the medical examiner the company was estopped from denying.

The COURT: That has nothing to do with the present feature; this witness is under cross examination.

Q. In whose handwriting are those answers there, doctor?
A. They are mine.
Q. And d-d you write them down in the presence of Mr. Rolcson?

A. I presume I did.
Q. You presume you did.
A. Yes sir.
Q. Can you state definitely whether you did or did not?
A. That is my hand writing.
Q. Can you state whether or not you wrote that in the presence of Mr. Roloson?
A. I did.
Q. Did he sign it in your presence?
A. He did.
Q. Then doctor, you knew when he signed it, and you signed it what were the contents of this application, did you not?
A. Ye- sir.
Q. And in that you did not say any thing to the company about the sickness that he had had did you?
A. I did'nt know any thing about the sickness that he had, except what I heard.
Q. Had you known the cause of Mrs. Roloson's death?
316 A. It was the universal talk I think that she had consumption,—I did not know. I did not wait on her.
Q. But you knew of it, did'nt you doctor, as a matter of universal talk in the neighborho-d in which you were a physician?
A. Yes sir.
Q. You knew that when you made out *that* this applicati-n did'nt you?
A. Knew what?
Q. What you have stated about the common talk as to her physical condition, and the cause of her death.
A. Yes sir.
Q. And you also knew that Mr. Rol-son nursed his wife through that sickness and was with her al- the time?
A. I did'nt know that.
Q. But you did know about his being sick a short time after her death?
A. I heard he was sick; I did not k-ow it personal-y.
Q. Now is it not a fact that during the year 1901, Mr. Roloson was perceptibly weaker than he was in the year 1900, and that after his wife's death he never was the same man but gradually failed until he died?
A. I don't believe that is a fact.

Redirect examination by Mr. RANDOLPH:

Q. Why is it doctor you do not believe that is a fact.
A. I lost the connection of the question.
Question read.
A. Well, I think it was perceptible to every body that the man looked better after that; that is, it was my understanding that he was sick in the spring, or was confined to his house, and I could not see, as much as I saw of him, that he declined any in flesh, or in
317 any way seemed to be in a poor state of health.
Q. When did you first notice he was in a poor state of health?

A. My first attention was called to it a short time before he died, especially called to it.

Recross-examination by Mr. KERR:

Q. You said your attention was especially called to his failing health a short time before he died—how long before he died.

A. W-ll, I don't remember just what time it was. Some months I think before he died.

Q. Your attention was especially called to it.

—. ——.

Q. He died in February, 1903. Now it was many months before that time that your attention was especially called to it, as you have stated.

A. Not many months, did I say.

Q. You said several months?

A. I didn't believe I said several months.

The COURT: I think he said some months.

Q. How long was it, before his death that your attention was especially called to his failing health?

A. I don't remember; I don't believe it was over a couple of months.

Q. What do you me-n by saying your attention was especially called to it then—had you noticed it before that time, and noticed it particularly now?

A. No sir, I had not saw Mr. Roloson for some time. I don't know where he had been, but I met him on the street one day, and he was not looking very well

Q. Can you fix the time?

A. No sir, I can't. I asked him what seemed to be the
318 matter with him.

Q. I am trying to get at the date. I want to fix the date; haven't asked for the conversation; can you tell us the date of this meeting you have just mentioned?

A. No sir.

Q. Can you say what month it was in?

A. I can not.

Q. Can you say what year it was in?

A. Well, it was in 1902, I think.

Q. Can you state the season in which it was?

A. It must have been in the early winter.

Q. Now that is as definite as you can fix it.

A. Yes sir, about there I think.

Q. How long a time had passed since you saw him before?

A. I don't remember I know it had been some time though, I hadn't seen him.

Q. Some months?

A. Possibly weeks, two, three or four weeks. I don't remember which but I remember I hadn't seen him for quite a while, and I made the remark.

Q. That is what impresses it particularly on your mind?

A. Yes sir.

Q. Were you not in the custom of seeing him frequently?
A. Yes sir, I had been.
Q. He was living in Weatherby?
A. Yes sir.
Q. And he was around there when he was well?
A. Yes sir.
Q. And you were around a great deal?
A. Around there more or less during the day. I was in
319 the country quite a bit of the time.

Dr. CHARLES O. PATTON, was next called as witness on behalf of the plaintiffs, and being duly sworn, testified as follows:—

Direct examination by Mr. RANDOLPH:

Q. Your name is Charles O. Patton?
A. Yes sir.
Q. You are a regular practicing physician are you?
A. Yes sir.
Q. Regularly graduated?
A. Yes sir.
Q. How long have you been practicing medicine?
A. About 18 years.
Q. Where do you live?
A. McFall.
Q. How long have you lived there?
A. About 18 years.
Q. Ever since you began practici-g?
A. Yes sir.
Q. Did you know Eber B. Roloson in his life time?
A. Yes sir.
Q. How long have you known him?
A. Ever since I have lived in McFal-, 18 years.
Q. Did you ever attend him?
A. Yes sir.
Q. Tell the times you attended him.
A. The first time I was called to see him was about 15 years ago. He lived next door to me. His wife called me in. He had a bad cold.
Q. In the last four or five years, that is, within the last
320 four or five years prior to his death, did you attend him at any time?
A. I was called to see him in September, 1900, or 1899.
Q. When was it with reference to the death of his wife?
A. It was following the death of his wife.
Q. The September following the death of his wife would be 1900.
A. That is right.
Q. What was the matter with him at that time?
A. Seemed to have what we call a remittant, or bilious fever.
Q. Do you know how long duration it was?
A. About 2 weeks.
Q. Where was he living at that time?

A. In Weatherby.
Q. And you were living at McFall?
A. Yes sir.
Q. You came down there to see him?
A. Yes sir.
Q. Did you attend on his wife in her last sickness?
A. Was called in consultation, yes sir.
Q. Now after September, 1900, did you wait on him any more?
A. He was in my office in about 2 weeks after that I think.
Q. What condition of health was he in at that time?
A. He seemed to be pretty weak at that time, about the conditio/ a man would be in after an attack of that kind.
Q. He was convalescent at that time?
A. Yes sir, better.
Q. How long after that did you see him again?
A. Off and on, well as long as he lived; he visited McFall occasionally.

Q. What was the condition of his health at that time.
321 A. His condition from that time on seemed better. He seemed to recover from that, and seemed to be in pretty good health.
Q. How long before his death you saw him?
A. I saw him about 3 weeks before he died.
Q. Where did you see him.
A. In Weatherby.
Q. Did you attend him?
A. Called in consultation with Dr. Lee, yes sir.
Q. The gentleman just on the witness stand?
A. Yes sir.
Q. Now prior to that time, when had you seen him last?
A. I don't know exactly when I saw him last before that.
Q. Did you see him during the previous summer?
A. Yes sir.
Q. Now during the previous summer doctor, when you saw him, did he have any appearance of being afflicted with progressive or pernicious aen-emia?
A. No sir.
Q. Did he have any symptoms, or appearance of being afflicted with tuberculosis?
A. No sir.

Cross-examination by Mr. KERR:

Q. You say you saw him during the summer before his death.
A. Yes sir.
Q. Did you treat him during that summer, or just casually meet him.
A. I just met him.
Mr. RANDOLPH: I want to ask how well you knew him.
The WITNESS: I knew him pretty well. Our houses were apart something like as far as across this room.

Mr. RANDOLPH: That is when you lived at McFall.
322 A. That is about 15 years ago, at McFall.
Mr. RANDOLPH: Then you frequently saw him after that?

Mr. BROWN: We object to the style of the question.
The COURT: The questions are a little leading.

Mr. RANDOLPH: How frequently did you see him, and where did you see him?
The WITNESS: Well, during the year that he lived in McFall I saw him every day, I might say almost. Of course some days he might be out of town, and some days I was out, but I saw him frequently.
Mr. RANDOLPH: After he moved to Weatherby, how often did you see him.
The WITNESS: He usually visited our town some 2 or 3 times a year, and I always saw him when he was there.
Mr. RANDOLPH: Did you ever examine him for life insurance.
The WITNESS: Yes sir.
Mr. RANDOLPH: Do you remember when that was?
The WITNESS: In 1901, I think it was.
Mr. RANDOLPH: Did you examine him thoroughly at that time?
The WITNESS: Yes sir.
Mr. RANDOLPH: What was his physical condition.
The WITNESS: His physical condition was very good at the time.
Mr. RANDOLPH: At the time you examined him?
The WITNESS: Yes sir.
Mr. RANDOLPH: You found his phyisical condition good?
The WITNESS: Yes sir.
Mr. RANDOLPH: What time did you say it was?
The WITNESS: I think the exact date was the 15th. of March 1901.
323 The COURT: Did you find he was suffering from any disease at that time:
The WITNESS: No sir, I could not detect any disease at that time.
Mr. RANDOLPH: Did he have any cough that you ever discovered.
The WITNESS: He was about as free from cough as any Missourian I was ever acquainted with.

Dr. HUGH PATTON, was next called as a witness on behalf of the plaintiffs, and being duly sworn testified as follows:—

Direct examination by Mr. RANDOLPH:

Q. Give your name.
A. Hugh J. Patton.
Q. Where do you live?
A. I live at McFal-, Mo., Gentry County.
Q. Are you a regular physician?
A. Yes sir.
Q. Regular graduate of a medical school?
A. Yes.
Q. How long have you been practicing medicine.

A. 13 years, this coming April I began.
Q. Are you related to Dr. C. O. Patton, who just testified.
A. Yes sir.
Q. What is the relationship?
A. Brothers.
Q. You practice together?
A. Yes sir.
Q. Did you know Eber B. Roloson?
—. ——.
Q. How well did you know him?
A. Quite well.
Q. Did you ever attend him?
A. Well, I can't say that I ever did. My attention, if I may be rmitted to explain, was called to him I think after—at the time was recovering, the first visit he made to McFall after the attack entioned, in Weatherby.
Q. After the bilious attack?
A. Yes sir.
Q. What condition was he in at that time?
A. Well, he was not up to a normal condition of health at that ne.
Q. Was he what you would call a convalescent?
A. Seemed to be recuperating, evidently was, from the condition had been in.
Q. Did you see him after that?
A. I saw him yes sir.
Q. What condition did he seem to be in when you saw him afterrds?
A. Well, he seemed to gradually get back to his normal standard, near as I [illegible]termine; I never examined him after that until er.
Q. When was it you examined him?
A. Well, just a little time prior to his death.
Q. Was that at his home at Weatherby?
A. Yes sir.
Q. You were there in consultation with your brother?
A. No, I was there after my brother was there.
Q. Was in consultation with Dr. Lee?
A. I was.
Q. Had you seen him during the Summer prior to his last sickness?
A. Occasionally.
Q. Now during that Summer Doctor, was there anything in his pearance that indicated progressive aen-emia?
A. Nothing abnormal that one would determine from an obtive or subjective point of view.
Q. Was there anything that would indicate it at all?
A. No sir.
Q. Was there anything in his appearance that indicated tuberlosis?
A. No, I think not.

Q. Did he ever have a cough to your knowledge?

A. I don't know that I ever noticed him coughing; not sufficient to attract any one's attention at least. That is something that would be a little hard to answer, something that a great majority of people are——

No cross-examination.

Dr. C. O. PATTON was recalled to the stand and testified further as follows:

The COURT: I understood you to say you were called into consultation at the time of Mr. Roloson's last illness?

The WITNESS: Yes sir.

The COURT: How long before he died?

The WITNESS: I think about three weeks.

The COURT: What was he suffering with?

The WITNESS: He just seemed to be—didn't seem to be suffering any way; didn't complain of anything hurting him.

The COURT: Could you tell what malady he was afflicted with at that time?

326 The WITNESS: Well sir, what I thought to be pernicious aæn-emia.

The COURT: Were you able to form an opinion as to the cause of the disease?

The WITNESS: I could not discover any cause; my attention of course was drawn to that condition and I tried to find some cause that might have produced it, the aæn-emic condition, and unless it was caused—from the history of the case I thought it must be caused from mental worry or shock.

The COURT: Would mental worry affect his digestion?

The WITNESS: Certainly would.

The COURT: Did it?

The WITNESS: It certainly did, yes sir.

The COURT: That was a part of the history of the case that you had gotten, that his appetite had failed?

The WITNESS: Yes sir.

The COURT: How was his assimilation?

The WITNESS: Not good; he did not seem to have any desire to eat, didn't want to eat, said he couldn't eat. I asked him if the taking of nourishment into his stomach was painful. He said not—said he didn't have no desire to eat; didn't want it.

The COURT: From your experience and study as a physician, would those conditions produce aæn-emia?

The WITNESS: I certainly think they could.

The COURT: What was your opinion as to the cause of the aæn-emia in his case?

The WITNESS: That is what I thought it was caused by, the worry and shock; that is what I thought produced it.

Redirect examination by Mr. RANDOLPH:

327 Q. Doctor, what history did he give you of his case? What did he say—tell you about being exposed, anything of that kind?

Mr. KERR: We object to counsel leading the witness and object to the question asked as incompetent, irrelevant and immaterial, and as calling for hearsay evidence.

The COURT: I suppose it is competent for a physician to state what a patient tells him of his condition and his feelings, and in so far as Mr. Roloson stated to you what his feelings were you can state.

To which ruling of the Court defendant at the time excepted.

The WITNESS: In regard to what he said his feelings was?

The COURT: Yes.

A. I led him out, asked him how he felt, he said all right; asked how he rested nights, said he slept well; asked if he suffered pain, he said no; I says what seems to be the trouble—nothing; I asked him if he didn't want to eat. No, he said, he didn't want to eat. I asked him if the introduction of the food into the stomach was painful. He said it was not. I demonstrated that fact by fixing a hot milk and giving it to him. He took it all right while I was there. He didn't want to take any medicine. I asked him about that—he says I can take it if you want me to; seemed to be willing to do anything I wanted to suggest, but was not desirous of doing so unless I did suggest it.

Q. Did he seem to care whether he recovered or not?

A. Said not.

Q. What did he say about that?

A. Said he had no desire to live.

Q. What history did he give you of his case?

Mr. KERR: I renew the objection. I direct my objection to that.

328 The COURT: I do not think it is competent to adduce the narrative which a patient gives of past conditions. He can just state his feelings.

Q. Did you know of anything that had occurred to cause him mental worry?

A. Yes sir.

Q. What was that?

Mr. KERR: We object and ask that the Court instruct the witness that he can only answer as to matters of his own personal knowledge and not matters coming through hearsay.

The COURT: Of course you are confined in stating in regard to facts as to what you know yourself, and not what you had learned from others.

Q. I asked you if you knew of any cause for his mental worry?

A. Yes sir.

Q. What was the cause?

A. Well, about six months prior to his death he bought about 150 head of cattle. About ten days or two weeks after he bought them he found he had paid about 50 cents a 100 too much——

Mr. KERR: We object. It does not appear that they are natur-

ally within his knowledge, and ask the privilege of cross-examining him.

The COURT: I think he has been cautioned sufficiently.

Mr. BROWN: If the Doctor knew how much of his own knowledge that would come within the Court's instructions.

The WITNESS: I can tell you how I knew it. I was in touch with Mr. Roloson by 'phone every few days, talked to him about matters of that kind. We was interested some in stock and he was a man that kept himself posted about the prices of cattle. We were thinking about buying some at the time. At the time I was talking to him we was 18 miles apart. I says "What does cattle cost now.

Mr. KERR: We object to the statement. He has stated that it is simply the statement of Mr. Roloson he was about to tell.

The COURT: That was the point. Probably you did not understand. You could not tell what you learned from Mr. Roloson even in regard to his cattle deal.

Q. Now at the time you went down to consult with Dr. Lee during Eber B. Roloson's last sickness, did you learn wh-ther or not he had suffered a great financial loss?

Mr. KERR: We object to that if the Court please as calling for hearsay evidence, as incompetent, irrelevant and immaterial, and as calling for a conclusion.

The COURT: I do not think it is material I will sustain the objection.

Q. Now doctor, if Mr. Roloson had in the early Fall bought 150 head of cattle, and found out 10 days afterwards that he had paid 50 cents a hundred too much for them, and then had purchased 300 head of hogs, and 300 of them had died, and he had been compelled to put the remaining 60 on the market before they were matured because of a disease among them, and he had seen from the time these troubles began in November and September until the time of the final shipment of the cattle early in February of the same month that he died, -ad seen a great loss coming, and then it had come to him upon the final sale of his stock, would you say that was sufficient cause to produce the condition you found when you visited him?

Mr. KERR: We object to this hypothetical question as based upon a hypothesis and facts which do not appear in evidence, and therefore as incompetent, irrelevant and immaterial.

The COURT: I suppose the evidence can be made in the course of time to conform.

Mr. RANDOLPH: Yes sir.

The COURT: Upon his statement that he will adduce the proper evidence I will overrule it.

To which ruling of the Court defendant at the time excepted.

A. I certainly think it was, yes sir.

Cross-examination by Mr. KERR:

Q. Now you have answered yes to the questions stated by counsel

upon the assumption that a financial loss and worry such as described by him had taken place how long before the death?

A. The beginning of this was at least six months.

Q. Do you intend to testify that the death of Mr. Roloson was in your opinion caused exclusively by the fact of this loss and the worry consequent upon it, or do you mean to say Doctor that that helped along his otherwise physical condition?

A. I mean in my opinion that was sufficient to have caused it.

Q. It was sufficient to have caused it?

A. I think so.

Q. What is aen-emia Doctor?

A. Well, it is an impoverished condition of the blood, either in quality or quantity.

Q. And in what way does it become apparent to the layman's eye?

A. Well it is a term called aen-emic, may become emaciated, or, in other words, you would say pale; perhaps the laity will know it by that term "pale."

Q. Do you mean to state that pallor is always an indication of an aen-emic condition?

331 A. No sir.

Q. But it is one of the evidences of the existence of aen-emia?

A. Yes sir.

Q. Is aen-emia a primary or a secondary condition?

A. It may be either.

Q. More ordinarily it is secondary, is it not?

A. Yes sir, that is a fact.

Q. And only in very exceptional cases is it a primal condition?

A. That is right.

Q. It is a result, rather than a disease?

A. As a rule.

Q. And wherever you find aen-emia Doctor, or an aen-emic condition, you find an impoverished condition of the blood?

A. Yes sir.

Q. And a consequent physical weakness?

A. That is a fact.

Q. And that has been caused by lack of food or improper digestion, or imperfect assimilation, or all together?

A. Yes, or even more than that; that does not cover the field.

Q. That or some kindred condition?

A. Yes sir.

Q. And either of these conditions would in itself produce aen-emia would it?

A. Aen-emic might be produced by a number of causes.

Q. Will you please enumerate the causes which in your opinion would likely be provocative of this condition?

A. From consumption, cancer, ulcer, hemorrhage and—I do not know that I can call to mind all of them, but quite a number.

Q. From anything which enfeebles the system?

A. Yes sir.

332 Q. And aen-emia is a very usual concomitant of consumption, isn't it?

A. Usually an aen-emic condition in consumption, yes sir.

Q. And an aen-emic condition first becomes apparent to the layman's eye by the emaciation of the subject, does it?

A. To the layman's eye, yes sir, that is a fact.

Q. And by an unusual and increasing pallor and weakness with it?

A. Yes sir.

Q. And a generally feeble condition?

A. That is a fact.

Q. And as aen-emia progresses from its inception to the final condition it may result in death, the patient gradually gets weaker?

A. Yes sir.

Q. If it be a fact Doctor that Mr. Roloson was for some three years prior to his wife's death growing weaker, I say assuming that to be true, and considering that in the light of the conditions which you found when you examined him immediately before he died would you not say that this was a progressive anæmic condition dating back to the time when his enfeeblement began?

A. No sir, a progressive pernicious aen-emia means short, and soon ends, and it would not continue for three years.

Q. Then would it be under the stated circumstances in your opinion the natural product of the conditions which began three years before?

A. No sir.

Q. Would it be an original or primary condition in your opinion

A. I do not know as I just get the question.

333 Q. If a man has been getting weaker for three years and finally dies of what you term progressive aen-emia, would you say that the aen-emia is an intervening special disease or the product of pre-existing conditions?

A. That question is incomplete.

Q. Until you answer it.

A. I can't answer it that way for this reason——

Q. If you will——

A. This aen-emia would not have existed, progressive aen-emia does not cover that long a field. I want to answer a question right if I can.

Q. And you say Doctor, and I want you to answer according to your own understanding, you say it is sometimes a product of pre-existing conditions?

A. Yes sir.

Q. Now I ask you that if it be a fact that Mr. Roloson had been gradually declining for three years prior to his death——

A. Yes sir.

Q. And the condition existed which you found existing in February, 1903, would you say that that aen-emia, an aen-emic condition which you found there, was the result of his gradually getting weaker and the conditions which caused that was an original disease?

A. They would be an original disease for this reason: The aen-emia for some cause would not last that long; he would have to have some

other disease to come up to this before the aen-emia set in; then of course there would be a primary cause.

Q. The primary cause in this case under the supposiiti-ous circumstances would be the cause which caused the general decline?

A. Yes sir.

334 Q. And the ultimate result would be progressive aen-emia, resulting in death?

A. Not necessarily.

Q. Well, in this case?

A. I can't just catch you. It is like this: Progressive aen-emia you understand does not last this long. If he was gradually going down hill for 3 years there would certainly be some cause. Then what I would see after would be the cause.

Q. The cause being shown?

A. If the cause was shown I tel- you what you might have. You might have some of these diseases that produce aen-emia, or, rather that aen-emia follows, you would perhaps have the history of that.

Q. Suppose, doctor, that it should be a fact that Mr. Roloson was during the year 1900, suffering from chronic gastritis——

Mr. RANDOLPH: There is no evidence of that. Dr. Baker's testimony was that it was sub-acute.

The COURT: Call it gastritis.

Q. Supposing that after that time he had a dry, hacking cough, that he, when he coughed put his hand up this way, to his throat and said it hurt him, and those were his conditions for the year following 1900, and that he kept gradually getting weaker, and that finally the condition arose which you found, would you say that there was any conn-ction between that condition which you found in 1903, and the condition which did exist before that time?

A. No sir, there would be this: you would have, you might have the other trouble—the aen-emia might be the immediate cause of death, but it would not be the remote cause of the trouble.

The COURT: You keep misunderstanding him. Suppose it should be established here that Mr. Roloson had had gastritis for

335 three years up until this aen-emia developed. Would you say then that the gastritis was the cause of the aen-emia.

The WITNESS: The primary cause, certainly would.

Q. So with any other of the diseases which you say would produce aen-emia?

A. Yes sir.

Redirect examination by Mr. RANDOLPH:

Q. If that was the cause, you would find the original gastritis?

A. I certainly think the gastritis would exist prior to that, and be so developed that any competent physician would be able to detect it.

Q. At the time of the last illness?

A. Certainly would have diagnosed its symptons that enable us to determine existence of these diseases that cause aen-emia.

Q. Did you discover any gastritis at the last sickness?

A. No sir.
Q. Did you discover any primary trouble?
A. No sir.
Q. I would like you to describe Mr. Roloson as near as you can.
A. Do you want the description at the time that I visited him in his last illness?
Q. No, his general description when he was normal; the summer before he died; his general appearance.
The COURT: His appearance when in normal health.
A. Sometimes a physician comes to a conclusion by exclusion, and someimes we can come to a conclusion by comparison. If you will allow Mr. Cash Roloson to stand up I will try and explain to you how he looked.

Mr. BROWN: We can not put him in the record.

336 Q. Make a description without Mr. Cash Roloson.
A. Anatomical, or physical.
Q. Tell it so the jury will understand.
A. Well, he was medium size, square made man. Neither robust, he was not a robust man, he was rather a delicate looking man, all his life; a wiry fellow, would get up and go, move around.
Q. About how tall was he?
A. I measured him, I would say about 5 feet and 8 or 9 inches.
Q. About what was his weight?
A. About 140 pounds I think, on the average.
Q. What was his complexion?
A. He was rather fair.
Q. What was the color of his hair, as near as you can tell.
A. Brown, as I remember.
Q. Much grey?
A. A few hairs of grey in his whiskers, and his mustache.
Q. Did he look older than he was, or younger?
A. I don't believe so, looked about his age. Very few men but would have a few grey hairs at that age.
Q. Did he have an old looking face, or otherwise?
A. No sir, just medium I would say for a man of that age.

337 JOHN REDMOND was next called as a witness in behalf of the plaintiff and being first duly sworn testified as follows:

Direct examination by Mr. HAYNES:

Q. Mr. Redmond, you know Austin Craig?
A. Yes sir.
Q. The one that testified here,—the Austin Craig that testified here in this case?
A. Yes sir.
Q. Do you remember of seeing him in Weatherby after the death of Mr. Roloson a short time?
A. Why, yes sir, I saw him pretty often right along.
Q. Did you hear him state in the town of Weatherby, after the death of Mr. Roloson, that if the returns on his cattle that he

shipped a short time before his death had have turned out favorably that he would still have been a live man?

Mr. KERR: We object as incompetent, irrelevant and immaterial, and because it is not a proper subject matter of impeachment, because Mr. Craig said that while he did not remember whether he said it he believed it to be so.

The COURT: If he does not admit the statement unqualifiedly, then it is proper to show that he made the statement.

To which ruling of the court the defendant at the time excepted.

Q. That or that in substance?

A. Yes sir, I think I did, possibly several times.

Q. You think you heard him say that several times?

A. Yes sir.

Q. Mr. Redmond, did you or did you not make a trip with Mr. Eber B. Roloson to St. Joseph in December 1902?

A. Why, yes sir, I made two or three trips, or possibly more trips than that.

338 Q. When was your last trip with him?

A. I think the last trip was possibly in December.

Q. About what time in December?

A. Well, I couldn't say.

Mr. DOLMAN: I think, if your honor please, that testimony was all gone over.

Mr. RANDOLPH: No, it was not. The court excluded any cross-examination of the witness.

The COURT: Proceed.

Q. You are speaking of December 1902. He died in February 1903. Now, tell us all about that trip, what kind of weather it was and all about it?

A. We had something like three or four loads of hogs there, I had either one or two loads of my own——

Q. Where?

A. At Weatherby. I don't know whether those other two load of hogs was Mr. Roloson's or not, but any way we accompanied the hogs and loaded after night, and it was a very bad night, it was raining——

Q. When you loaded at Weatherby, it was raining?

A. Yes sir.

Q. Where did you ship them to?

A. We shipped them to St. Joe.

Q. You say "we" loaded them after night and it was raining. Whom do you mean by "we"?

A. Mr. Roloson——

Q. Eber B. Roloson, this dead man?

A. And myself and possibly we had some help, but I don't think I could tell just who helped.

Q. Who came to St. Joseph with you?

339 A. Mr. Roloson and myself.

Q. There are two or three Mr. Rolosons. Please state Eber so we can understand.

A. Mr. Eber.
Q. What time did you arrive?
A. Something like 2 or 2:30 in the morning.
Q. Where did you stop when you got here? I mean where did the train stop.
A. Well, it stops in the Yards. We was dropped off in the Yards quite a ways below the Union Depot.
Q. You mean the freight yard of the Rock Island Railroad Company?
A. Yes sir; we just dropped back to Hickory street and went straight out to the street car line.
Q. Hickory street is south of the Union Depot and you went from there over to the street car line?
A. Yes sir.
Q. What would you say as to the weather that morning?
A. It turned pretty cold. Almost quit raining.
Q. What did you do when you got over to the street car line?
Q. What did you do when you got over to the street car?
A. We stopped and talked a minute about whether there was any car.
Q. Did you wait for a car?
A. I didn't wait very long. There was some one else, I can't be sure whether it was one of the boys from Weatherby or a gentleman from Clarksdale. Any way we talked for a minute about the street car and me and this gentleman went up the street, I think, to the Union Depot hotel, and Mr. Roloson argued there would be street cars to the city and waited.
Q. When did you see him next?
340 A. The next morning, possibly eight o'clock, down at the Stock Yards.
Q. What did he do?
A. I think he bought some cattle, possibly he didn't buy but he was looking.
Q. Looking at cattle?
A. Yes sir.
Q. You saw him there at the Yards?
A. Yes sir.
—. ——.
A. Well, I don't know that I could tell that.
Q. Did you go together, you and Mr. Eber B. Roloson?
A. I can't say for sure.
Q. How soon after that trip did you see him at Weatherby?
A. I can't say that I ever saw Mr. Roloson any more after that day.
Q. What became of him?
A. I think he took sick, took down. I never went to see him after he took his bed.

Cross-examination by Mr. KERR:

Q. Now, Mr. Redmond, did you say how Mr. Roloson looked at this time? Have you yet answered that question?

A. Well, not today.
Q. Not today. Are you sure of the date as being December 1902?
A. Tolerably sure. I couldn't positively make it but I am tolerably sure it was December.
Q. You were with him how many days on this occasion?
A. Well, just the afternoon we loaded the hogs and the next day here at the Yards.
Q. What did he do in the way of loading these hogs?
A. Well, he stood at the car door and just kind of held
341 them in as we run the hogs in; stood with a stick and held them in.
Q. He was bothered with a cough?
A. Yes sir.
Q. And he looked weaker than he did before?
A. He gradually looked weaker than he did before.

Mr. RANDOLPH: We object to this cross examination of their own witness.
The COURT: I believe this is the defendant's witness.
Mr. KERR: He put him on as his witness.
Mr. RANDOLPH: We put him on to show the exposure and to show that he took sick immediately afterwards; to show the beginning of his sickness.
Mr. KERR: I claim the right to cross examine.
The COURT: If you wish to confine your examination to this one time I think I will allow you to do so.

JAMES EWART was next called as a witness in behalf of the plaintiffs and after being first duly sworn testified as follows:

Direct examination by Mr. HAYNES:

Q. Captain, where do you reside?
A. Maysville, De Kalb county, Missouri.
Q. How long have you resided there?
A. Thirty-seven years the first day of next month.
Q. What is your business?
A. Banker and farmer.
Q. How long have you been engaged in that business?
A. Ever since—well, I commenced the banking business within two weeks after I got there, and I drifted into farming as I
342 accuc*u*mulated farms.
Q. To what extent do you farm?
A. I have several thousand acres of land.
Q. Do you know Eber B. Roloson?
A. Yes sir.
Q. What was his business?
A. His business when he first came to the country, I think he taught school one or two terms.
Q. When was that?
A. In 1874.
Q. Well, now since that tell me what you know of him?

A. Well, he has been farming and handling stock until his sickness.

Q. What was the extent of your acquaintance with him?

A. Well, I was as well acquainted with as I was with any man in the country.

Q. Why?

A. He was doing business with me more or less in the bank. Oh, well, there were other reasons, his people came from the same part of the east that I did.

Q. You had business transactions with him?

A. Yes sir.

Q. Will you be kind enough to tell the jury all you know of him in reference to his health and physical condition in your opinion, size and all about it?

A. His size corresponds just exactly with this description. I give it just now as I got it there. As I stated to the parties,—two or three of us were talking—he was about five feet seven or eight inches in heighth and weighed 140 pounds.

343 Q. What about his strength generally? What kind of a man was he? Was he physically strong?

A. He was of course slight, slender build rather, but an active wiry man of his size. I mean by active he was energetic and always on the go.

Q. From your association with him, your business transactions with him, and what you knew of him, what do you say was the condition of his health?

A. I think his health was about like an ordinary man of his build and age. He was not a powerful looking man and he was not a sickly looking man. He was not an invalid in appearance to me and he was not a powerful man either but compared with other men about his size and age.

Q. You were acquainted with him and observed him and saw him up to the time of his last sickness?

A. No, there was one year or nine months or something that he was gone to Illinois along in 1870. Then during the winter of 1902 I don't remember of seeing him. I went away in the spring of 1902 and was gone during the summer and fall. I came back on the 7th day of September and I heard he was seriously sick in Weatherby. That left a period of twelve or thirteen months that I didn't see him.

Q. But from the last time in 1874 when you say he made a trip to Illinois, up until the time you left you saw him frequently?

A. I saw him every time he came to Maysville. I saw him frequently; he had business in the county seat.

Q. I don't mean you saw him every day, but you saw him at intervals during that whole period?

A. Yes sir.

344 Q. What was the appearance of him physically the last time you remember of seeing him?

A. I didn't notice any change other than what would be expected through his advancing age.

Cross-examination by Mr. KERR:

Q. You mentioned a moment ago not seeing him prior to his death?

A. Well, from twelve to fourteen months somewhere.

Q. You mentioned some sickness in that connection?

A. Oh, no sir, simply the sickness he had when he died, his last sickness.

Q. You didn't see him at that time?

A. No sir.

Q. You have said that he died in February 1903. You hadn't seen him for twelve months prior?

A. Yes, a little longer than that.

Q. In the fall of 1901?

A. Yes sir.

Q. How frequently would you say you saw him during the fall of 1901?

A. Well, I couldn't say how frequently I saw him at any time for years.

Q. Towards the latter part of his life you saw less of him than in the early part of his life?

A. Yes sir; his business drifted off down the other way.

Q. And after he began to live in Weatherby you didn't see as much of him as you did before?

A. He borrowed money of me occasionally, but his principal business was done at Weatherby and McFall, and possibly he did some at Pattonsburg.

Q. During the last five years of his life?

A. Longer than that.

345 Q. And your acquaintance is rather confined to the earlier years of his life?

A. Yes, I knew Cash more than him in later years.

Q. Do you remember the occasion of Mrs. Roloson's death?

A. I know nothing of it. I heard she was dead and knew he was a widower. I knew nothing about it.

Q. It appears she died in the fall of 1899. Do you remember the sickness he had after her death?

A. No sir.

Q. Do you remember seeing him at any particular time during 1900 and 1901?

A. I don't think I can any more than any other farmer. I saw him in 1899 because I had business with him. I took a mortgage from him in the spring of 1899.

Q. And you are willing to swear, to say that you did see him because you took a mortgage in 1899?

A. Yes sir.

Q. In the spring of 1899?

A. Yes sir, I think in April 1899.

Q. Will you say after that year you ever saw him personally?

A. I certainly think I did but I have no particular date to fix the matter.

Q. He was never what you call a robust man?

A. He was not an athlete. He was a wiry, undersized, of nervous temperament. I don't mean a nervous disease, but an active man.

Q. That is in early years?

A. As long as I knew him. For his age I considered him so.

346 JOHN MCCLURE was next called as a witness in behalf of the plaintiffs and after being first duly sworn testified as follows:

Direct examination by Mr. HAYNES:

Q. Mr. McClure, where do you reside?

A. At Weatherby, Missouri.

Q. How long have you resided there?

A. Well, sir, I think about eighteen or twenty years. Ever since the town began.

Q. What is your business?

A. Merchant.

Q. Did you know Eber B. Roloson?

A. Yes sir.

Q. How long were you acquainted with him?

A. I have been acquainted with Mr. Roloson from 1874 until the time of his death, probably about twenty-eight or twenty-nine years.

Q. How intimate was your acquaintance with him?

A. Well, sir, I have been intimately acquainted with him. When he first came to this country he was teaching school and I went to school to him one term.

Q. After he quit teaching school what did he do?

A. Well, sir, he was a farmer most of the time and a stock raiser. He handled stock.

Q. Did you ever have any business transactions with him?

A. Yes sir.

Q. State whether he was a customer at your store or not?

A. Yes sir, part of the time.

Q. Will you describe him to the jury, his physical appearance, as you remember him?

A. He was rather a slim man and probably weighed 135 or
347 140. Not a very strong looking man. About in my class, I suppose, for size and strength ordinarily.

Q. Well, as to his size what would you say in reference to his strength?

A. Well, sir, I suppose he was as strong as any man of his size ordinarily.

Q. As strong as any man of his size ordinarily. With reference to his activity, getting around and about attending to business what would you say? Describe that in your own way?

A. Do you have reference to the latter part of his life or all of my acquaintance?

Q. All of his life?

A. Well, he was an active fellow and had lots of ambition, high lived and lots of fun about him when I first knew him. I was a young man with him.

The COURT: Mr. McClure, we are chiefly interested in his condition from 1900 on.

Q. Did you know him in 1900?
A. Yes sir.
Q. And in 1901?
A. Yes sir.
Q. What was his physical condition in 1900?
A. That was about the time his wife died. Of course, he wasn't so strong then.
Q. Why do you say so?
A. Because he had a spell of sickness about that time.
Q. Just after the death of his wife?
A. Yes sir.
Q. Did he recover from it?
A. I think he did to a great extent.
348 Q. What was his physical condition after his recovery?
A. I didn't see so much of him right away after his recovery because he was on his farm.
Q. Not right away but at any time after his recovery?
A. I rather thought he was back to his normal condition.
Q. You thought he was back to his normal condition?
A. Yes sir.

Cross-examination by Mr. KERR:

Q. What is the business in which you are engaged?
A. Merchant, selling goods.
Q. Dry goods?
A. Yes sir, general store.
Q. After Mr. Roloson moved to Weatherby he spent most of his time in and stayed there, didn't he?
A. Yes sir, I think he did.
Q. And was away but very little?
A. Well, sir, I think he spent some of his time on his farm. That is my recollection.
Q. During the last two or three years he didn't go to his farm as frequently, as he ceased business?
A. No sir.
Q. So during 1900 and 1901 he stayed in town about all the time?
A. I think so.
Q. After his wife died he practically ceased doing business?
A. So far as hard work was concerned.
Q. And he was not as actively engaged in the stock business or any other business as he was before, was he?
A. I couldn't say. He handled stock after that.
Q. Oh, yes, he handled some stock after that?
A. Yes sir.
349 Q. Where did he spend most of his time while in the city of Weatherby after his wife's death?
A. I think he spent most of his time in De Hart & Riggs' store. He worked there.
Q. The De Hart and Riggs here in court?

A. Not this Mr. Riggs, a cousin.

Q. You didn't see as much of him as Mr. De Hart did because he worked for him and spent a good deal of his time there?

A. No sir.

Q. You said in answer to a question of counsel a moment ago that he had a sickness after his wife's death?

A. Yes sir.

Q. Now, it appears that Mrs. Roloson died in October 1899. When would you fix the date of this sickness?

A. My recollection is that it was right away after her death.

Q. And how sick was he that time?

A. I didn't see Mr. Roloson while he was sick.

Q. You knew he was sick, out of sight for a time?

A. Yes sir.

Q. And you assume that time to have been in the early part of the year 1900?

A. Yes sir.

Q. Now, during that summer he was convalescent, was he? He didn't recover at once?

A. He didn't get well right quick.

Q. In fact, during that summer he was just getting around, wasn't he?

A. Yes sir.

Q. His recovery was slow?

A. He didn't recover very quick.

Q. And he seemed to be feeble?

350 A. Not very strong.

Q. And he seemed to be worried and troubled after his wife's death, didn't he?

A. Well, I couldn't say. I wasn't with him very much; just met him.

Q. From what you saw of him, I want you to tell the jury whether you think he was ever the same man after that sickness that he was before?

A. He seemed to rally from the death of his wife, like any man would.

Q. He seemed to rally after the death of his wife, but never was as strong as he was before that sickness?

A. Not as strong as he was?

Q. I am talking about the effect of that sickness and his wife's death?

A. I rather thought he recovered to his normal condition after that time.

Q. During the examination of Senator Haynes you said you thought he recovered to a considerable extent. You meant to say he did not recover fully?

A. He never was very strong. He wasn't a robust strong man. I thought physically he recovered to his normal condition as he was before his wife died.

Q. Then please explain to the jury what you mean by saying you thought he recovered to a considerable extent?

A. I meant he never was a strong robust man at the best.
Q. Did he cough?
A. If I ever heard him cough I have no recollection.
Q. You never noticed that at all?
A. I never heard him cough that I have any recollection of.
Q. How would you describe his color?
351 A. Well, he was rather a yellow color, a swarthy color. He wasn't right pale, or wasn't dark, he was swarthy.
Q. What do you say to describing his color as sallow?
A. That is what I would say.
Q. Are you related to him or his family?
A. His brother married my sister.
Q. Which brother?
A. C. N. Roloson, Cassius.

Question by the COURT:

Q. How often did you see Mr. Roloson in 1900, 1901 and 1902?
A. I would see him probably every day. I bought some corn for him in the fall; had some business with him.

EDWARD ROBERTS was next called as a witness in behalf of the defendant and after being first duly sworn testified as follows:

Direct examination by Mr. HAYNES:

Q. Mr. Roberts, where do you reside?
A. Near Weatherby.
Q. How far?
A. About two miles southeast.
Q. How long have you lived there?
A. Eleven years. This March twelve.
Q. What is your business.
A. Farmer.
Q. Did you know Eber B. Roloson?
A. Yes sir.
Q. How well did you know him? What I mean was it a passing acquaintance or an intimate one? Did you know him well?
A. I suppose I knew him well.
352 Q. For how long?
A. Well, since I was a boy probably eleven or twelve years old.
Q. Can you describe him to the jury? That is his physical being as you remember it?
A. He was square built, slender man, five feet, eight or nine inches high; weighed 138 or 140 pounds.
Q. What do you say of his strength for a man of his size?
A. I think he had fully an average strength for a man of his size.
Q. What do you know in reference to his strength and health in 1900 and 1901?
A. I never heard of any sickness to amount to anything until he died.

Q. Do you remember of hearing of the death of his wife?
A. I heard something about it. I never knew much about it.
Q. Well, you heard of it?
A. Yes sir.
Q. When did you last see him alive.
A. Oh, probably, I think I saw him about the time he shipped his cattle the last time when they went to Chicago, about twenty days before he died.
Q. About twenty days before he died?
A. Probably something like that.
Q. Where was he?
A. At Weatherby.
Q. Where was he?
A. Probably might have been around home. I saw him down town frequently, and saw him there often.
Q. Did you see him the summer before that?
A. Yes sir.
Q. That was the summer of 1902?
353 A. Yes sir.
Q. How often did you see him?
A. Probably twice a week on an average.
Q. What would he be doing?
A. He would be busy around town with his stock, or on the streets, or up in the stores.
Q. As far as you could judge from his movements and what you saw him doing what was the condition of his health?
A. I thought his health was as good as usual; that is normal. I never heard him complain.
Q. You saw him doing work?
A. Yes sir.
Q. You saw how he moved around?
A. His health was normal as far as I know.
Q. How was it compared with his health before the death of his wife?
A. Well, other than age, I never noticed any difference.
Q. Did you ever hear him cough?
A. No sir; I never remember of hearing him cough. I never remember of hearing you cough, but I might have heard you here today.
Q. What I want to know is did you ever notice anything like an incessant or continuous cough?
A. Not that I know of. Not that I ever heard.
Q. To what extent is your business in farming and stock raising and shipping?
A. I have been feeding stock, hogs and cattle, continuously for the last seven years.
Q. Tell the jury whether because of that you came in contact with Eber B. Roloson?
A. Him and me would talk. I would help him load his stock sometimes and sometimes he would help me load.
354 Q. What did he load?
A. He helped load and helped drive the cattle and kicked

the hogs in the car just like anybody else would do in loading stock as far as I know.

Cross-examination by Mr. KERR:

Q. You say the last time you saw Mr. Roloson was about twenty days before he died?
A. Yes sir.
Q. At what place in Weatherby?
A. I don't remember.
Q. Out on the streets?
A. Probably out on the streets. He might have been in the store. I was in town.
Q. Can you tell what store?
A. No, I don't remember. He usually stayed in De Hart & Riggs.
Q. That is probably the place where you saw him?
A. May have been.
Q. Do you remember having any conversation with him at that time?
A. No; I don't remember any conversation at that time.
Q. What has caused you to recollect that you did see him?
A. In regard to shipping his cattle.
Q. You talked to him about that?
A. No sir; I heard he was.
Q. You saw him shipping them?
A. People would hear it over the country. There were lots of cattle.
Q. And he was in his usual condition of health?
A. As far as I know.
Q. How close were you to him?
A. I may have met him.
355 Q. What was he doing?
A. He was about town.
Q. Where did you see him?
A. I saw him in town.
Q. Do you remember that you did see him?
A. I am pretty well satisfied.
Q. Have you a mental picture of seeing him that day?
A. Yes sir. I remember of meeting him in town.
Q. And it is quite clear and distinct?
A. I certainly remember.
Q. Were you walking?
A. I may have been walking. I walked around town often.
Q. Do you remember what you were doing when you did see him?
A. No; not exactly.
Q. What was he doing when you saw him?
A. I don't remember.
Q. Do you remember where you were?
A. We were in town.
Q. Yes, Weatherby is quite a place and you can't say any more than in Weatherby?
A. No.

Q. Do you remember the time of day?
A. No, I don't remember of it.
Q. Are you related to any of the Roloson's?
A. No sir.
Q. Or Mr. Riggs or Mr. De Hart?
A. No sir, not that I know of.
Q. How long have you been engaged in the stock business?
A. Well, I have—in fact, I was born in De Kalb county.
Q. How old are you now?
356 *Q. How old are you now?*
A. I will be 39 in June.
Q. Do you mean to say, to testify, now that up until twenty days before his death Mr. Roloson was in his usual physical condition?
A. As far as I knew.
Q. You did know, didn't you?
A. I never examined him.
Q. You want us to understand that you didn't see enough of him to enable you to testify?
A. I saw him.
Q. Was he strong and vigorous?
A. I saw him out on the streets and around his business as usual.
Q. He was as usual?
A. He undoubtedly was if I saw him.
Q. Yet you mean to say—Will you swear on your oath that twenty days before Mr. Roloson's death you saw him in the village of Weatherby, and that you then saw him transacting his usual business, and do you say he was as strong as usual?
A. I can't say. I said about that time. I didn't say twenty—I thought it was. It might have been a month before he died.
Q. What was it?
A. I don't know.
Q. You are not able to say how long it was before he died?
A. I never saw him after that time.
Q. How long between that time and the other previous time you had seen him?
A. I don't remember. Probably that week; I seen him every week.
Q. Did you see him every week in 1901?
A. I don't know.
Q. Did you hear of his sickness in 1900?
357 A. I heard something.
Q. You didn't notice his absence?
A. No sir.
Q. And yet you saw him quite frequently?
A. Yes sir.
Q. And you were in Weatherby right along?
A. Yes sir.
Q. And he was a business associate?
A. Yes sir.
Q. And in fact through the years 1900, 1901 and 1902 he was well and about as usual?

A. He was well as far as I knew. I never noticed any difference in him. I knew him when I was a boy.

Direct examination by Mr. HAYNES:

Q. How large a farm have you?
A. I have two hundred acres.
Q. How far from Weatherby?
A. A mile and a half; by the road two miles, but my land lies a mile and a half from Weatherby.

GEORGE RHOADS was next called as a witness in behalf of the plaintiffs and after being first duly sworn testified as follows:

Direct examination by Mr. HAYNES:

Q. Where do you reside?
A. I reside at Weatherby, Missouri.
Q. How long have you resided there?
A. Well, off and on about, I guess about eighteen or nineteen years.
358 Q. What is your business?
A. I am a lumberman there.
Q. How long have you been in the lumber business?
Q. Well, I started a yard there in 1892, I believe it was. I ran the yard until about 1895 and sold it out, and then I bought it again in 1901.
Q. 1901?
A. Yes sir.
Q. Were you acquainted with Eber B. Roloson?
A. Yes sir.
Q. How long?
A. I think I must have known him off and on for about 20 years.
Q. Will you describe him to the jury, that is physically?
A. Well, he was about such a looking man as——
Q. Just describe him?
A. He was about 5 feet 8 inches tall and he was a spare made fellow. I think just prior to his death I weighed him several times on my scales, I think he weighed 145 pounds. That is the way my memory serves me now.
Q. Now, take into consideration his size, what do you say in reference to his physical strength?
A. I think he was a quick, wiry, active fellow.
Q. Did you have any business dealings with him?
A. Yes sir.
Q. When?
A. Off and on I sold him a good deal of lumber. I bought some corn for him and had quite a good deal of dealings with him at Weatherby.
Q. Commencing in 1899 what were your business transactions with him?
A. I had no business relations with him in 1899.

Q. Did you in 1900?
359 A. I was in Mound City then.
Q. When did you return to Weatherby?
A. I bought the yard back the first of September 1901. I commenced having business with him from that time on.
Q. September 1901?
A. Yes sir.
Q. Now, you had known him before that, before you went to Mound City?
A. Yes sir.
Q. Now, how did his condition in September 1901 when you returned from Mound City to Weatherby compare with his condition previous to 1899, his physical condition?
A. When I returned from Mound City he looked bad to me. His health was poor. I understand his wife had died just prior to that time, and I have since learned he had had a sick spell although I knew nothing about that.
Q. Now, about his recuperation? Tell the jury about that?
A. Well, he seemed somewhat under the weather for some little time. Then during 1902 he began to recuperate and got fleshier and stronger and in fact in 1902 he was as strong as I ever knew him.
Q. 1902?
A. Yes sir.
Q. Did he buy any lumber of you?
A. Yes sir.
Q. Who handled that lumber?
A. I handled some of it and I generally had a man in the yard who generally handled and hauled it.
360 Q. Did he assist in it?
A. Yes sir.
Q. What kind of lumber was it?
A. It was fencing and barn doors and shingles.
Q. Do you know anything about him building a corn crib?
A. Yes, he built a corn crib in the fall of 1902 prior to his death.
Q. Where did he get that lumber?
A. Got it from me.
Q. How far did he build the crib from your lumber yard?
A. About three blocks.
Q. Do you know who did all the work?
A. I don't know who did all.
Q. Did he do any of it?
A. He did.
Q. Tell the jury what you saw him doing?
A. Why, a couple of men put in the poles, and first went to work and laid some logs out of six inch fencing, then put in large poles and put in cross ties which some fellows hauled, but then when they commenced to hauling corn his men quit and he couldn't get anybody to assist him, every body got busy and the hands struck——
Q. Who finished the crib?

A. He did excepting putting on the roof. He had some one help him to put on the roof.

Q. Tell the jury what you know in reference to his ability to do the work?

A. I remember again he would come to the yard and get a pretty good load of lumber and carry it to the crib on his shoulder.

A. How much of a load?

361 A. I was asked that question. I just looked it up on my book. At one time he carried a load that would weigh 140 pounds.

Q. What was it?

A. Fencing.

Q. You saw that?

A. Yes sir.

Q. During that time did you notice anything in his physical condition that showed weakness?

A. During the fall of 1901?

A. I mean 1902?

A. No sir; nothing more than common.

Q. Do you know anything about his cough, whether he had a cough?

A. If he had one I never knew it. I was with him every day he was in town during the year 1902, every day that he was in town, I guess, because he was at my place of business and generally loafed around my office and yards.

362 Cross-examination by Mr. KERR:

Q. Your name is George W. Rhoades?

A. Yes sir.

Q. Are you related in any way to the Roloson's?

A. No sir.

Q. Is your wife?

A. I think perhaps—yes, my wife was a second cousin of Eber Roloson's wife.

Q. You came to Weatherby in the Fall of 1901?

A. Yes sir.

Q. In the month of September 1901?

A. Yes sir.

Q. From the time you opened your business in that month Mr. Roloson was around your place of business a good deal wasn't he?

A. Yes sir.

Q. You and he were particu*a*lrly friendly?

A. No, not particular friendly. He was around there a good deal but to say we were intimate friends or anything of that kind I wouldn't say that, no sir.

Q. When had you seen him before that month?

A. Before September?

A. Yes, 1901.

A. I had seen him in August, loafing around Weatherby, loafing around the streets.

Q. Had you been in Weatherby during the whole of the year 1901?

A. No sir.

Q. Were you there at any other time before August 1901?

A. No sir.

363 Q. How far prior to August 1901 do you mean? When did you see him before that?

A. I saw him I think it was in September 1899.

Q. And from September 1899 to August 1901 you didn't see him?

A. No sir.

Q. September 1899 was prior to Mrs. Roloson's death?

A. Yes sir.

Q. And when you saw him in August 1901 he was a very sick man wasn't he?

A. In 1901?

Q. Yes.

A. Well, no, he wasn't what you would call a very sick man, I wouldn't suppose.

Q. You would say he was—was in bad condition then, thin in flesh and looked pale and bad?

A. Looked in bad health, yes sir.

Q. Able to be up and around, but was feeble and sick looking?

A. Not feeble.

Q. Just sick looking?

A. Looked bad, yes sir.

Q. And he continued that way for some time?

A. Well no, I thought he began to mend right along from that time.

Q. Had you had any personal knowledge Mr. Rhoades of his sickness of the year before, or had you heard about it?

A. No sir, I hadn't knew nothing about it.

Q. Can you fix the time in August 1901 when you came to Weatherby and met him?

A. Yes sir.

Q. If you please.

A. What was the date when I came to Weatherby and met him?

Q. Yes.

364 A. No sir, I couldn't do that.

Q. It was the early part of the month of August?

A. Yes sir, I could fix the day I came to Weatherby from Mound City, that would — the 12th day of August I came there.

Q. Then you went back and returned in September and then continued?

A. Yes sir.

Q. Was Mr. Roloson susceptible to the influence of cold weather—did that seem to affect him?

A. I never noticed him much that he was, no sir.

Q. Did he seem better in the Summer or Winter?

A. I couldn't see much change in him.

Q. You say he looked sick in the month of September 1901—did you ever talk to him about what was the cause of that sickness?

A. No sir, in fact I never knew he was sick—well I never knew he was sick during the time I was away at all until I heard the witnesses here testify about it.

Q. Didn't you and he talk about what had made him get sick?

A. No sir.

Q. Never asked him?

A. No sir.

Q. Did you ever hear him say anything to any person else about what was the cause of it?

A. No sir.

Q. But you recognized the fact that something was the matter?

A. Yes sir, that he had been sick.

Q. That was apparent to you at once?

A. Yes sir.

Q. And that continued along to the Summer of 1902, when he picked up?

A. No sir, he commenced to mend and get better that Fall
365 of 1901 and during the Winter and Spring of 1902, but I noticed a perceptible change in him during the Spring of 1902—he got much fleshier.

Q. Up to the Spring of 1902 he was sort of recuperating, convalescent?

A. Yes sir.

Q. And your idea is that he succeeded in becoming his old self in the Summer of 1902?

A. You have the meaning exactly.

Q. Could you see him improving all the time?

A. I thought I could.

Q. But his recovery did not seem to be perfect until the Summer of 1902?

A. That is just about the way I would have it sized up.

Q. When, would you say, in the year 1902, did he become his old self, midsummer or early Fall?

A. Along about the middle of the Summer.

Q. July, let us say?

A. Yes sir, well, before that.

Q. June?

A. Yes, about in June, May or June.

Q. And up to that time you could see that he was not himself, but about the month of June he recovered?

A. Yes sir.

Q. And from the month of June on until the time of his death you say he was in practically the same condition?

A. Well, up until now, as Mr. Redmond here stated, he taken down after that trip here to St. Joe with some stock, and from that time on he commenced to go down and got continuously worse till his death.

366 Q. Mr. Rhoades, you are a creditor of the estate of Eber B. Roloson?

Mr. HAYNES: We object to that as incompetent.

The COURT: The objection is overruled.

Objection withdrawn.

Q. In the sum of seven hundred dollars.
A. No sir.
Q. How much?
A. Why, I don't know just how much it is. It is somewhere between $150 and $200 I think. Perhaps it will run somewhere about $200.
Q. That is for the lumber furnished, is it, to him?
A. Yes sir, lumber bought by Eber Roloson himself.
Q. What about the corn you bought for him?
A. He paid, I think the estate perhaps paid for all that; they paid me, at least; I know I was paid for it.
Q. That debt of $500 on account of the corn has been paid since the death, has it?
A. Yes sir.

367 J. P. DEAN was next called as a witness in behalf of the plaintiffs and after being first duly sworn testified as follows:

Direct examination by Mr. HAYNES:

Q. Mr. Dean, where do you reside?
A. I reside in De Kalb county.
Q. What part?
A. I live a mile south and 8 miles west of Weatherby.
Q. How long have you lived there?
A. About twenty-three years.
Q. What is your business?
A. Farmer.
Q. Did you know Eber B. Roloson?
A. Yes sir.
Q. How long had you known him?
A. I think about ten or twelve years, probably may have known him longer than that. I don't remember when I first saw him but I didn't know much about him until he moved to Weatherby.
Q. When was that?
A. Five years ago.
Q. In 1899 or 1900?
A. Yes sir.
Q. How often have you seen him?
A. Quite often. Usually when I was in town and would go to town I would see him. I went sometimes two or three times a week, sometimes not so often.
Q. What was his description as you remember it, physical?
A. He was a pale looking man; that is a kind of swarthy color, not a very stout looking man.
Q. He was thin?
A. Yes sir.

368 Q. As to his size what do you say in reference to his strength and endurance?
A. He looked to be a man of usual strength of his age.
Q. Do you know anything about his endurance? What he did?
A. No sir; I don't know much about his business of course. My

farm was south of town and his north and his business was in the other direction from where I lived.

Q. When did you see him last alive?

A. I think three or four weeks before he died.

Q. Where?

A. In Weatherby.

Q. What was his condition then?

A. He looked pretty much like a sick man.

Q. Three or four weeks before his death?

A. Yes sir.

Q. Do you know anything about his property?

A. Nothing personal only hearsay.

Q. Now the summer before you saw him in Weatherby three or four weeks before his death, what was his physical condition?

A. He looked to be the same as the first time I saw him.

Q. When was that?

A. I couldn't tell exactly when; it has been some years.

Q. Approximate as near as you can?

A. I should judge it to be ten or twelve years anyway, maybe longer.

Q. Then in the summer of 1902 he appeared to be about the same physically as when you first saw him ten or twelve years before?

A. I couldn't see much difference, only the difference of his age.

Q. Difference in his age certainly?

A. Yes sir.

369 Q. Do you know whether he had a cough or not?

A. I never noticed it.

Cross-examination by Mr. KERR:

Q. How frequently used you to see him?

A. Sometimes two or three times a week and sometimes not so often.

Q. During all of the last five years of his life?

A. No, I didn't see him that often.

Q. You started to say he looked pale during the year 1902?

A. Yes sir.

Q. Go ahead and finish?

A. He was a pale looking man, swarthy color, didn't look very hearty.

Q. Never did look hearty?

A. Yes sir.

Q. Perhaps you would call him a delicate man and was always that way?

A. Ever since I knew him.

Q. Did you have any particular social acquaintance with him?

A. No sir.

Q. Did you know any of his family?

A. Yes sir; I knew his brothers.

Q. Are you in any way related to them or him?

A. No sir.

Q. Did you know Mrs. Roloson?

A. I can't say that I did.
Q. Do you remember the time of her death?
A. I heard of it. I don't recollect the date. I know I heard of it.
Q. In the fall of 1899 immediately after that and in the early part of 1900 did you see much of Mr. Roloson?
370 A. I don't think I did, any more than I did at any other time. I don't think I saw him at first just after his wife's death as often as I did later. I think he stayed up to his place.
Q. Did you know of his sickness?
A. I heard of it. I never visited him.
Q. Did you know of his sickness in the fall of 1900?
A. No sir; I don't recollect it.
Q. Did you notice after his wife's death the effect of her sickness and death upon him?
A. I can't say that I did.
Q. And you would see him frequently?
A. Not as often as I did in the last year or two.
Q. And you would say how often you saw him in the fall of 1900?
A. I couldn't say, no sir. I couldn't say how often any one time. I saw him two or three times a week.
Q. Where did you see him? In Weatherby?
A. Sometimes in De Hart's; sometimes in Rhoads' lumber yard, sometimes on the streets and sometimes in the stores.
Q. You were most likely to find him at Riggs & De Hart's or at Rhoads' lumber yard?
A. The last year I seen him there as much as any place.
Q. He didn't seem quite well to you during the last year of his life?
A. I couldn't say. He never looked very well to me.
Q. And this appeared during the last couple of years?
A. Yes sir.
Q. Did he ever talk about grieving over Mrs. Roloson's death?
A. No sir.
Q. After that time he gradually declined?
A. I couldn't say that he declined. If he did I never noticed it.
371 Q. He didn't look strong?
A. Never did.
Q. He didn't look as if he had much blood in his system?
A. He didn't look like he had.

Thereupon the court adjourned until Saturday morning, March 11th, 1905, at ten o'clock.

SATURDAY, *March 11th*, 1905.

I. F. RIGGS was next called as a witness in behalf of the defendant and after being duly sworn testified as follows:

Direct examination by Mr. HAYNES:

Q. Mr. Riggs, where do you reside?
A. I reside in De Kalb county, Missouri.
Q. What part of it?
A. Eastern part.
Q. How far from Weatherby?
A. About a mile and a half, I think?
Q. Your avocation?
A. Farmer.
Q. Do you hold any official position up there?
A. Justice of the peace.
Q. How old are you?
A. I am 45 years old.
Q. How long have you lived there?
Q. 45 years.
Q. Did you know Eber B. Roloson?
A. Yes sir.
Q. How long?
372 A. Ever since 1875.
Q. Will you describe him?
A. Mr. Roloson was a spare made man about 5 feet 10 inches; rather sallow complexion.
Q. Did you know him continuously on down to his death?
A. Yes sir.
Q. We will say, for instance, we will take him in 1900, 1901 and 1902, you remember the circumstances of his wife's death?
A. Yes sir.
Q. Did he or did he not following that have a sick spell?
A. Yes sir.
Q. Did you see him much after that?
A. Yes sir, I saw him quite a good deal.
Q. From what you saw of him and knew of him, state to the jury whether or not he recovered from that spell of sickness following the death of his wife?
A. I think he did.
Q. To what extent?
A. I think he was normal; about what he was before.
Q. Before?
A. Yes sir.
Q. Did you ever see him do any manaual labor?
A. Yes sir, frequently.
Q. In the latter part of his life?
A. Yes sir.
Q. When?
A. Well, most always when he had any business to attend to he did it.

Q. State to the jury his ability to get around and do his work, his physical condition?

373 A. He seemed to be as strong at that time as he did previous to that before his sickness.

Q. Taking into consideration his size and build what would you say in reference to his strength?

A. I think that he had average strength of a man of that build.

Q. Do you know anything about a corn crib that was built there at Weatherby by Mr. Roloson?

A. Yes sir.

Q. Did you furnish any of the material for that crib?

A. I furnished the posts.

Q. Describe those posts to the jury? First, I will ask you when that was?

A. That was in November.

Q. When? What year?

A. 1902 I believe.

Q. 1902. Now you furnished him the posts. Describe to the jury the size of those posts.

A. Those posts were of red oak and white hickory.

Q. Dry or green?

A. Green.

A. How long were they?

A. They were 13 and 14 feet.

Q. What size?

A. They run from 6 to 8 inches at the butt.

Q. How many did you furnish?

A. 17.

Q. Did he assist you in any way about that?

A. He assisted me in unloading those posts was all.

Q. Unloading them when hauled up to the crib that was partly built?

A. Yes.

374 Q. State to the jury what you and he did?

A. I drove into his lot with the posts and he was there. I was on the wagon and he took the hind end of the wagon and moved the front end.

Q. What did you do?

A. I would take one pole and throw it off——

Q. The front end?

A. Yes, and Mr. Roloson would take the pole and take it off at the other end.

Q. What would you have to do?

A. He held the hind wheel of the wagon and took hold of the other end of the pole. That is he had the small end of the pole however.

Q. State to the jury whether it seemed to weary him any doing that or whether he did it without trouble? Just state all about it?

A. I don't know whether it was any trouble. I didn't pay any particular attention.

Q. Did you discover any?

A. I didn't discover any.
Q. Did you see him at work on that crib afterwards?
A. Yes sir.
Q. Tell the jury what he was doing?
A. I seen him nailing the lumber on and carrying the lumber from the lumber yard.
Q. Carrying the lumber how?
A. Carrying it on his shoulder.
Q. How much?
A. Sometimes as much as four or five boards.
Q. How often did you see that?
375 A. I couldn't say how often I seen him.
Q. More than once?
A. Yes sir.
Q. That was the fall before he died?
A. Yes sir.
Q. Mr. Riggs, considering his condition then as compared with his condition for a few years previous to that, 5, 6, 7 or 8, years back, compare his condition on those two occasions and state to the jury what it was physically?
A. Physically I could see no difference.
Q. How often did you meet him?
A. Mr. Roloson?
Q. In the last 4 or 5 years, or 3 or 4 years of his life?
A. Well, almost every day.
Q. Almost every day. Tell the jury why it was you came in contact with him almost every day?
A. Well, I was in town frequently and in passing from town to his farm he went past my farm.
Q. Do you know anything as to whether he had a cough or not?
A. If he had a cough I never knew anything of it to my observation.
Q. Are you acquainted with his general reputation in the town of Weatherby and the immediate vicinity——

Mr. KERR: We object to the question on the ground that it is incompetent, irrelevant and immaterial.
The COURT: Wait until the question is formulate-; he has not finished his question.
Mr. KERR: Please don't answer that question when it is completed.

Q. —for honesty, fair dealing, truth and veracity?

A. Mr. KERR: I renew the objection, if the court please.
376 The COURT: It hardly seems to me the evidence is admissible. I will hear what you have to say on the subject or any light that you can throw on the subject.
Mr. HAYNES: Mr. Randolph and I misunderstood the court to say it was hardly admissible.
The COURT: I said I didn't think it was. I don't think you can go into character evidence in such a case.
Mr. HAYNES: In their answer they make a direct attack on the

honesty, fair dealing and truthfulness of this man; the whole theory of the defense is that he was dishonest and that he lied when he signed that application. They have made a direct attack.

The COURT: I understand what it is that makes general character evidence. They say he told a falsehood in regard to this matter. Aren't you confined to proving that he told the truth in regard to the matter? Can you go into general reputation?

Mr. HAYNES: The rule in our State court is that when character is attacked we can prove his general reputation for truth and veracity.

The COURT: Character you can, of course, in a proper case put it in, but in a civil case generally it is irrelevant. The objection is sustained.

To which ruling of the court the plaintiffs at the time excepted.

Cross-examination by Mr. KERR:

Q. Mr. Riggs, your occupation is that of a farmer?
A. Yes sir.
Q. What, if any, relation are you to Mr. Paul Riggs?
A. I am a cousin.
Q. What, if any, relation to the Mr. Riggs who is in business with Mr. De Hart?
377 A. Brother.
Q. Where would you *lost* usually see Mr. Roloson in Weatherby during the last five years of his life?
A. In Weatherby?
Q. Yes sir.
Q. Well, that I can't hardly answer that question.
Q. What was he doing during that time?
A. Mr. Roloson was feeding cattle and attending to his farm.
Q. Anything else?
A. Generally looking after his business in town.
Q. What business other than you have described?
A. Well, I don't know of any business that he did outside of his farm business, stock raising and feeding.
Q. His farm was several miles distant from Weatherby?
A. Yes sir.
Q. And al. this time you saw him frequently driving to and fro from his farm?
A. Yes sir.
Q. And sometimes riding on horseback?
A. Yes sir.
Q. Did he go to his farm as frequently during the last three years of his life as he did the three years before that?
A. No sir; for this reason——
Q. Please answer the question "no sir." I am not asking you the reason yet. Then you would not see him as frequently out of Weatherby during the last three years of his life as during the three years preceding that, would you?
A. Well, hardly.
Q. When you saw him in Weatherby what was he doing during the last three years of his life?

378 A. He was always pottering around, either at De Hart & Riggs store or Rhoads lumber yard, or at Paul Riggs.

Q. He had no business that you know of in Rhoads lumber yard? That is, he wasn't engaged in business there?

A. No sir.

Q. And when you saw apart from there, sometimes was he at his home?

A. Yes sir.

Q. You were a social acquaintance and friend of his?

A. Yes sir.

Q. Were you any relation of his or of his family?

A. No sir.

Q. How frequently would you visit him at his home?

A. I can't answer that question.

Q. Seldom or often?

A. Tolerably often.

Q. Apart from the time you saw him at Rhoads lumber yard, or saw him passing to his farm, or that you saw him when you were visiting him at his home, if you saw him in Weatherby you saw him at DeHart & Riggs' store?

A. I saw him there frequently.

Q. Did you go there very frequently?

A. Yes sir; I did all my trading there.

Q. Now, Mr. Roloson was working there during the last three years of his life a portion of the time?

A. I can't answer that question only in this way. I have seen him when he would be helping the boys when they were busy and on occasions of that kind. However, he wasn't employed, just helped them for accommodation.

Q. Their store was a general merchandise store?

379 A. Yes sir.

Q. Did Mr. De Hart live in Weatherby during this time?

A. De Hart?

Q. Yes?

A. Yes sir.

Q. In what other business was he engaged?

A. Mr. De Hart was engaged in farming.

Q. But he spent most of his time in his store did he?

A. Yes sir.

Q. Did you consider Mr. Roloson at any time a vigorous man?

A. Yes sir.

Q. A strong, healthy, vigorous person?

A. Strong, healthy, vigorous according to his size and weight and build.

Q. You don't agree then with Dr. Patton that he was a rather delicate man, do you?

Mr. HAYNES: If the court please, we object to that.

The COURT: It is cross examination. I will allow the question.

A. I don't know what Dr. Patton thinks of it.

Q. You don't agree with that description of Dr. Patton's?

A. I don't know what Dr. Patton's description is.

Q. His description was a rather delicate man. You say that is not so?

A. No sir, I didn't say it is not so. I say he was a strong, healthy, vigorous man for his size and build.

Q. Did you say he was not a rather delicate man?

A. No sir, I didn't say so.

Q. Will you say it?

A. No, I won't say.

Q. He was a rather delicate man?

A. It is owing to how you look at it.

380 Q. As to how you look at it?

A. I didn't pay much attention to it. I had gotten used to his ways and manner of life.

Q. You never paid enough attention to answer whether in your opinion he was a rather delicate man?

A. I suppose you would consider him a rather delicate man if you were a stranger.

Q. He had a sallow complexion?

A. Yes sir.

Q. And a bloodless looking countenance, didn't he?

A. I didn't think entirely bloodless looking.

Q. You would call him a full blooded man?

A. No sir; I wouldn't call him a full blooded man.

Q. There was something about his appearance that would lead you to think he was not full blooded?

A. I don't think that there was.

Q. Will you say there was not?

A. No sir; I won't.

Q. You remember the occasion of Mrs. Roloson's death?

A. Yes sir.

Q. That appears to have been in the fall of 1899. Do you remember his having a sickness in the early part of the year 1900?

A. Yes sir.

Q. You remember that. Did you visit him at his house when he had that sickness?

A. No sir; I didn't.

Q. That was in the months of February and March following Mrs. Roloson's death?

A. I could not answer that question positively.

Q. What is your best recollection?

381 A. I know it was after Mrs. Roloson's sickness, after her death.

Q. And not very long after? It was that winter, wasn't it?

A. I think it was possibly.

Q. How long was he sick at that time?

A. I can't answer the question. I don't know.

Q. Was he out of your sight for a time when he was sick?

A. Possibly a week, maybe two weeks. I can't answer the question.

Q. Might it have been a month?

A. No sir; I think not.

Q. Then your best recollection is that in the winter of 1899 and 1900 he had a sickness which confined him to the house for some week or two weeks?

A. I couldn't say positive about it. I know he had a sickness. I couldn't say possitive in regard to the length of time he was sick.

Q. Your best recollection is from one to two weeks?

A. No sir.

Q. What is your recollection?

A. I am trying to tell you I have no recollection in regard to time about it.

Q. You have no idea as to the duration of that sickness?

A. I know it was three days because I paid the bill for the nurse.

Q. And that nurse was wh-?

A. Mr. Leard.

Q. You remember it was in that winter but can't fix the time?

A. No sir; I couldn't. I could if I had my record.

Q. Have you that receipt where you can get it?

A. I didn't say that I had a receipt.

Q. Have you any memorandum or data which would
382 enable you to absolutely fix the date of that sickness?

A. I have no memorandum to show the date of the sickness but of paying for that nurse.

Q. How soon after the time of his sickness or when did you pay the nurse?

A. I couldn't answer that question.

Q. A very short space of time?

A. It might have been a short time and may have been ten days.

Q. It was according to your recollection about ten days?

A. Possibly, not over that.

Q. Now, where is that memorandum?

A. It is at Weatherby.

Q. Can you get that and produce it here in court if this case is on trial another day?

A. I am under obligation not to.

Q. Under obligations not to produce it?

A. Yes sir.

Q. Not to produce it?

A. It is in the record of my cash book and it belongs to the lodge.

Q. And that cash book is at Weatherby?

A. Yes sir.

The COURT: It does not make any difference about its being in your cash book. These matters have been subordinated to the administration of justice as far as any documentary evidence is concerned, it is your duty to produce it. You are required to lay aside duties and produce it and the court will see that other matters are not pried into.

Q. Will you produce that record Monday morning, Mr. Riggs?

A. I think I can.

383 Q. Did you visit him at his house after that sickness?

A. No sir; I didn't know he was sick?

Q. Until you got the nurse?
A. I didn't get the nurse; I paid the bill afterwards.
Q. That was the first you heard of it?
A. That wasn't the first.
Q. Did you know of it afterwards?
A. I knew of it after they got this nurse.
Q. How long was he confined to the house during that sickness?
A. I don't know.
Q. Had he been able to be out at the time you paid the nurse?
A. Yes sir.
Q. When he came out from that sickness had he apparently entirely recovered?
A. No sir.
Q. How did he appear?
A. He looked like he had a sick spell.
Q. Was he some feebler than before?
A. He seemed to be weak at the time.
Q. Did he seem to be paler than formerly?
A. I couldn't notice any difference in regard to that.
Q. The difference was he was weaker?
A. He seemed to be.
Q. Do you say he recovered his normal strength after that?
A. I do.
Q. In about what length of time?
A. I can't answer that question.
Q. According to your best recollection how long did it take him to recover from that illness?
A. I don't know.
384 Q. You have no idea at all?
A. No sir; I don't.
Q. It may have been a year?
A. I think not.
Q. What makes you think it was not a year?
A. I was doing some business with him occasionally, and of course I don't have any remembrance or recollection in regard to the time he was sick or how long it took him to get over. Possibly it took him a month. I don't know. It was no longer than that.
Q. You don't think it was any longer than a month?
A. No sir.
Q. Will you then state as your best recollection it was in a month after you paid this bill to Mr. Leard, or a matter of a month or ten days after he was nursed by Mr. Leard that he had recovered from the sickness entirely?
A. I don't understand your question.
(Stenographer read the question.)
A. I think he did.
Q. And he was around and attending to his business as usual?
A. Yes sir.
Q. When after that time was he sick?
A. I don't know of him having any sickness after that time.
Q. Did you see him continuously during that year 1900?

A. I think I did.
A. And how frequently?
A. Well, almost every day.
Q. And will you now swear that after the spring of 1900 he didn't have a sick spell?
A. I don't think he did until his last sickness.
385 That is my best recollection.
Q. Are you willing to swear that you saw him as often as once a week during the last eight months of the year 1900?
A. Well, I think I did.
Q. You will now swear you did?
A. I won't be positive but I think I did.
Q. And that he was not sick during those months?
A. I don't think he was to my best recollection.
Q. Do you remember the time of a sickness in the latter part of the summer of 1900 when he was attended by Dr. Patton from McFall?
A. Do I remember anything about the latter part of 1900?
A. Yes sir; the latter part of the summer of 1900?
A. No sir; I don't.
Q. You will not say he was not sick?
A. No sir; I won't say he was not sick, possibly he may have been.
Q. And if Dr. Patton says he saw and attended him, he must have had a sickness that you didn't know of?

Mr. HAYNES: We object to that as argument.
The COURT: Objection sustained.

Q. You visited his house while Mrs. Roloson was living?
A. I was — while Mrs. Roloson was sick.
Q. You visited his house while she was living?
A. Yes sir, I have been in the house while she was living.
Q. You knew her as well as him and was a social friend of the family?
A. Yes sir.
Q. Is it not a fact that he was very much attached to his wife?
A. Yes sir.
Q. And after her death grieved over her and her death?
A. Yes sir.
386 Q. And continued to do that during the remainder of his life?
A. Yes sir; I think so.
Q. Never seemed to get quite over the effect of her death?
A. I didn't think that he did.
Q. When would you say you saw him for the last time?
A. The night before he died.
Q. Did you see him continuously during his last sickness, that is every day or so?
A. No sir; I didn't.
Q. How often did you see him after he took to the house?
A. Well, I don't know.

Q. Do you remember the time when he was taken down with his last sickness?
A. Yes sir, about.
Q. I didn't ask for the date. You remember the fact?
A. Yes sir.
Q. Did you see him at the time he was taken down with his last sickness?
A. About the time, yes sir.
Q. You can't fix that date?
A. No sir; I can't.
Q. How long would you say it was before he died?
A. Well, possibly three or four weeks. I don't know, three weeks maybe.
Q. And you often saw him at his house I suppose?
A. Yes sir.

JOHN W. CHANNELL was next called as a witness in behalf of the plaintiffs and after being first duly sworn testified as
387 follows:

Direct examination by Mr. HAYNES:

Q. Where do you reside, Mr. Channell?
A. In Weatherby, De Kalb county.
Q. What is your business?
A. I am a blacksmith by trade.
Q. A blacksmith. How long have you been there?
A. Eleven years the first of last November.
Q. Were you acquainted with Eber B. Roloson?
A. Yes sir, I was.
Q. How long were you acquainted with him?
A. Well, I think about fifteen years.
Q. Was he a customer of yours at your shop?
A. Yes sir.
Q. How long?
A. Well, I think about ever since I have been in business there. About ten or eleven years. Ever since I have been in business there off and on.
Q. When you first got acquainted with him what was his condition of health?
A. Well, sir, it appeared to be as good as any man of his size and build as far as I knew.
Q. What do you have to say in reference to his strength for a man of his size and build?
A. I think he was a strong man to his size and build.
Q. How often did you see him the last three or four years of his life?
A. Well, I saw him quite often the last years while he lived in our town.
Q. What years was that?
388 A. I don't just remember when he moved there.
Q. We will take the years 1899 and 1900 and on down to his death?

A. Yes sir, I saw him quite often then.
Q. Why did you see him quite often?
A. Well, I don't know. I saw him—I lived right across the street from him, where he lived, for about two years or one year, I think probably. Then he moved and then I saw him on the street.
Q. How large a place is Weatherby?
A. It is not a very large place. I don't just know what the inhabitants is.
Q. What is your best idea about it?
A. 200 or 300.
Q. 200 or 300?
A. Yes sir, somewhere along there.
Q. Do you remember the occasion of the death of his wife?
A. Yes sir, I do.
Q. Do you remember whether or not following that he had a sick spell?
A. Yes sir; he had a sick spell following that.
Q. Did you see him after that?
A. I did.
Q. How often?
A. Oh, probably every day. I couldn't say whether I saw him every day. When he was in town I saw him every day; probably some days he was out at his farm, I didn't see him.
Q. Now, state to the jury whether or not he recovered from the sickness following the death of his wife?
A. I couldn't see but what he did.
Q. Describe in your own way his appearance and what you saw him do and all about it?
389 A. I don't know that I ever saw him do any manual labor. I have saw him when they were unloading corn and unloading stock, drive the stock rather into town and I saw him also do his part helping around.
Q. How long after the sickness that you spoke of following the death of his wife until he apparently had recovered?
A. I wouldn't say as to the length of time?
Q. When? What is your best opinion?
A. Well, probably a month or two months something like that. I couldn't say as to time.
Q. How would you compare his condition of health, strength, to his condition before the death of his wife?
A. Well, I think it was as good as it was before.
Q. Now, you remember the occasion of his last sickness?
A. Yes sir.
Q. When was that?
A. Well, I don't remember the time.
Q. Now, if he died February 28, 1903, you remember, do you or not of his taking sick the winter before, the latter part of 1902?
A. Yes sir.
Q. Now, preceding that sickness in the summer or fall of 1902 what was his condition, physically?

A. I considered his condition good as it had been before he had his spell of sickness.

Q. Do you know anything about him coughing? Whether he had a cough or not?

A. Not that I know of. I never heard him cough that I know of. Probably I may the same as other men, but I don't remember of hearing him cough.

390 Q. Now, in getting about his work and performing labor, you spoke of him loading stock and corn and such things as that. Take him in the summer and fall of 1902 and state to the jury how and in what manner he acted concerning it?

A. Well, he unloaded stock and shipped stock and unloaded corn. He always went in what I call a half run, here and there, got up early in the morning and always seemed to be in a hurry when they had business on hand.

Cross-examination by Mr. KERR:

Q. He was a very ambitious man, wasn't he?

A. I considered him so.

Q. Nervous and active?

A. Yes sir.

Q. Never was a large man, was he?

A. No sir; he wasn't a large man.

Q. Never was what you call a robust man?

A. No sir.

Q. Not a strong looking man?

A. I don't know whether he was a strong looking man in that term; I don't know what it takes to be strong looking man. He looked to be a man of plenty of strength according to his size and build.

Q. From general appearances you would describe him as a rather delicate man.

A. No sir; I wouln't described him as a delicate man.

Q. In fact to your eye he had no appearance of being delicate or sickly?

A. Well, no, I couldn't say he was sickly.

Q. Or delicate?

A. No, I couldn't say he was delicate.

391 Q. Would you say he wasn't delicate?

A. Yes; I would say he wasn't delicate.

Q. He had periods when he was stronger and more vigorous in appearance than at other times?

A. Yes, I think he did.

Q. And seemed weak but when business demanded his personal attention he became more active than at other times?

A. Yes sir.

Q. During the last few years of his life he didn't pay as much attention to business as he did formerly?

A. I couldn't say as to that.

Q. You became acquainted with him when?

A. About fifteen years before his death.

Q. He was then living on his farm?
A. No, he lived in Weatherby and shipped stock.
Q. Then he moved on on a farm. Have you lived there ever since that time?
A. No, haven't lived in Weatherby, a mile and a half from Weatherby.
Q. Have you seen much of him in that 15 years?
A. No, not until I moved to town the last eleven years.
Q. Now, since that time have you seen much of him?
A. Yes sir.
Q. And you would say he was paying as much attention to business and did as much during the last three years as he did before?
A. In what way?
Q. In any way?
A. I don't think I saw him do manual labor but he seemed to be the head man of the Roloson Brothers stock farm.
Q. He was the brains and they did the work for the concern?
A. It seemed like he was engineer of the whole business.
392 Q. And they atended to the work of it?
A. Yes sir.
Q. Now, where would you see him about Weatherby?
A. I saw him different places on the street. Probably met him on the street and in my place of business and in the stores.
Q. Was he around your place of business much?
A. Not a great deal not unless he had some business he wanted to see me about
Q. Did he spend much of his time on the streets around Weatherby?
A. I couldn't say he did.
Q. What stores did you see him in?
A. First one and the other. De Hart & Riggs, the postoffice and different places.
Q. You saw him more in De Hart & Riggs than any place else?
A. I don't know that I did.
Q. You say you remember the death of his wife in the fall of 1899?
A. Yes sir, I remember.
Q. Have you ever been socially acquainted with him to the extent of visiting him at his home?
A. No sir; I never visited him at his home.
Q. You remember Mrs. Roloson was sick quite a while?
A. Yes sir; she was sick quite a while.
Q. And you also remember in the winter following her death he had a spell of sickness?
A. Yes sir, I remember that.
Q. He was so sick he was confined to the house?
A. Yes sir.
Q. What is your recollection as to the length of time he was confined to the house?
A. My best recollection is it was one to two weeks, as well
393 as I remember. I don't just remember it.
Q. Then got well and out and about again?

A. Yes sir.
Q. When he did come out he was weak?
A. For a short period, yes.
Q. You would say the effects of that sickness were visible upon him for about a month?
A. It was probably a month or six weeks.
Q. Do you remember the sickness he had later in that year?
A. No sir; I don't remember.
Q. You don't remember the sickness he had when he had attendance of Dr. Patton?
A. Well, I can't say that I do.
Q. Would you say that after the illness from which he recovered in the winter of 1900, that he never had any other spell of sickness?
A. No sir; I wouldn't say that, because I don't know. To the best of my knowledge he never that I know of.
Q. Do you say that in the year 1902 he was as strong as he was in the year 1901, speaking of his general physical condition?
A. Would I say that he recovered from the sick spell that we spoke about until he was at himself as well as he was before he had the sick spell?
Q. Is it not a fact that in the fall of 1902 he appeared more vigorous than he had for a long time?
A. I can't say as to that.
Q. Would you say one way or another?
A. No sir.
Q. To your eyes you say his health remained constant until he was taken down with his final sickness?
394 A. I don't catch it.
Q. You say his health remained the same after he recovered until he was taken down with his final sickness?
A. I couldn't say as to that. He may have had some slight attack that caused him to be sick and maybe he felt bad. I don't know that he did.
Q. What was his color?
A. Light complected man.
Q. Did he seem to be a full blooded man? or thin blooded man?
A. I couldn't answer that question. I don't know what it takes to be a full blooded man. I don't understand it.

SILAS L. RIGGS was next called as a witness in behalf of the defendant and after being first duly sworn testified as follows:

Direct examination by Mr. HAYNES:

Q. Mr. Riggs, where do you reside?
A. Weatherby, Missouri.
Q. Are you related to one of the plaintiffs here, Mr. Paul Riggs?
A. Yes sir.
Q. In what way?
A. A cousin.
Q. Where do you reside?
A. Weatherby Missouri.

A. How long have you resided there?
A. About six years from January.
Q. What is your avocation?
A. Blacksmith.
Q. Did you know Eber B. Roloson?
A. Yes sir.
Q. How long?
A. Well, about six years.
Q. Then you knew him in 1898 and 1899?
A. I didn't know him until 1899.
Q. 1899. What time in 1899?
A. Well, I got acquainted with him after I came to Weatherby. moved to Weatherby in 1899.
Q. What time in 1899?
A. What time did I come to Weatherby?
Q. Yes sir?
A. In January.
Q. January 1899?
A. Yes sir.
Q. You say you are a blacksmith?
A. Yes sir.
Q. Are you in business with Mr. Channell or separate to yourf?
A. In business for myself.
Q. Was Mr. Roloson a customer of yours at your shop?
A. Yes sir.
Q. Well, now, when you became acquainted with him in 1899, nuary 1899, what was his condition as to health and strength?
A. Well, he was a spare made man and I thought he was a very tive man.
Q. What do you say in reference to his strength for a man of his e and build?
A. I thought he was an ordinary man.
Q. A man of ordinary strength?
A. About an average for his weight and size.
Q. How often did you see him after you became acquainted with m until his last sickness?
A. I seen him pretty often. Some weeks I would see him every y, then sometimes it would probably be a week I wouldn't see him.
Q. Do you remember the occasion of the death of his wife?
A. Yes sir.
Q. Did you see him immediately after the death of his wife?
A. Yes sir.
Q. Did he or did he not have a sick spell following her death?
A. Yes sir.
Q. That was in October 1899?
A. Seems—I don't remember just what month it was. It was at fall.
Q. Well, passing on to 1900. Did you see him in 1900, the early rt of the year?

A. Yes sir.
Q. Did you notice whether or not he had recovered from the sick spell that he had at that time?
A. I thought he was about normal.
Q. At what time?
A. Along in the summer.
Q. Summer of 1900?
A. Yes sir.
Q. You saw him after that along down to his death frequently, did you?
A. Yes sir.
Q. Did you at any time see him perform any manual labor about the town of Weatherby after that, after his recovery?
A. Yes sir, I have seen him performing some.
Q. Tell the jury what you seen him do?
A. Well, I seen him working on his corn crib. I seen him carrying some lumber.
Q. Was he carrying lumber?
A. Yes sir.
397 Q. How was he carrying it?
A. On his shoulder.
Q. Where from?
A. The lumber yard.
Q. How far did he have to go?
A. About three blocks.
Q. We don't know the size of the blocks out there?
A. Well, 150 yards, not farther.
Q. When was that?
A. In the winter of 1902.
Q. Whose yard was he carrying the lumber from?
A. Mr. Rhoads'.
Q. George Rhoads?
A. Yes sir.
Q. The gentleman who testified here yesterday?
A. Yes sir.
Q. What was he carrying? What kind of lumber?
A. Fencing lumber No. 6.
Q. How much?
A. He looked like he had 7 or 8 boards on his shoulder.
Q. Yes sir. Now, did you see him right at that time?
A. Yes sir.
Q. Were you close to him?
A. I was, yes sir, about 30 yards.
Q. Did anything occur?
A. I hollered and asked him if he was making a dray out of himself.
Q. How long did he stop?
A. He stopped long enough to turn just a quarter around while I spoke to him. I suppose he stood there about 10 seconds.
Q. With the lumber on his shoulder?
398 A. Yes sir.
Q. Then went on with it to the crib?

A. Yes sir.
Q. Will you state to the jury what his condition was at that time, physically, as compared with it in 1899?
A. Why, I thought it was a great deal better than I ever seen him.
Q. You thought it was a great deal better than you had ever seen him?
A. Yes sir.
Q. Now, the sickness that he had following the death of his wife was in the early part of 1900. Now, how soon did you think he recovered from that?
A. Well, I don't know just exactly how soon, probably two or three months. He was out on the street earlier than that.
Q. What do you say in reference to his condition of health from the summer of 1900 down until his last sickness?
A. Well, I thought he kept getting stronger all the time.
Q. Yes sir. Now at what date, what period of time would you state to the jury in 1900 he had fully recovered?
A. Well, the summer of 1902.
Q. Not speaking about 1900. What time in 1900?
A. Well, I thought he was recovered in the fall.
Q. Of 1900?
A. Yes sir.
Q. And from then on to his last sickness?
A. Yes sir.
Q. How often did you see him?
A. Oh, quite frequently.
Q. Quite frequently?
399 A. Sometimes I would see him every day in the week, and then probably it would be a week that I wouldn't see him.
Q. Now, state to the jury whether or not after that recovery on down to the date of his last sickness whether or not from what you saw and knew of him he remained in good physical condition and usual strength?
A. What I seen and knew of him he was in good shape.
Q. I omitted, Mr. Riggs, to ask you if at any time you saw him move his household goods?
A. Yes sir.
Q. Where?
A. When?
Q. Where and when?
A. He passed—he had to move his household goods right by my house.
Q. How far did he move them? What house did he live in? Whereabouts did he live?
A. He lived in Mr. Harper's house, I believe it was.
Q. What house did he move to?
A. The one he lived in when he died.
Q. How far did he have to move his goods?
A. Probably 200 yards.
Q. How did he move them?
A. Carried the most of them, I think.

Q. What was it?
A. He carried some bed steads; I seen him carrying them.
Q. When was it?
A. That was in June as well as I remember.
Q. How?
400 A. In June.
Q. What year?
A. About 1901 I reckon or 2.
Q. 1901 or 1902?
A. 1901 I think.
Q. Besides what he carried in his arms and hands in what other way did he convey them?
A. He got a wheel barrow.

Cross-examination by Mr. KERR:

Q. Mr. Riggs, you stated a moment ago that you thought Mr. Roloson recovered quite promptly from the sickness he had in 1900 and thereafter kept getting strength up to his final sickness. That is correct according to your recollection?
A. Yes sir.
Q. His final sickness began in the month of December 1902 and ended in February 1903. That is a fact is it not?
A. Yes sir.
Q. And he was better just before that final sickness than you had seen him in a long time?
A. Well, the summer before, yes sir.
Q. That is he had been improving right up to the time of his final sickness. That is what you said and what you mean to say?
A. Yes sir.
Q. From what time after his wife's death and his sickness did he begin to recover and improve?
A. He began improving in the summer and in 1902 he got fleshier than I ever seen him.
Q. And from the winter of 1900 up to that time he was not in as good health, was he?
A. Well, I don't know.
401 Q. When did you first become acquainted with him?
A. In 1899.
Q. The early part of 1899?
A. Yes sir.
Q. Before Mrs. Roloson's death, wasn't it?
A. Yes sir.
Q. Did you have any intimate acquaintance with him?
A. Never, only I done work for Mr. Roloson.
Q. In your business?
A. Yes sir.
Q. Do you remember the occasion of Mrs. Roloson's death?
A. Yes sir.
Q. You remember he was very much attached to her?
A. Yes sir.
Q. And was worried and grieved before her death?

A. Yes sir, I think he was.
Q. And seemed to take her death very much to heart?
A. Yes sir.
Q. And very soon afterwards he was taken down with an illness o severe he had to have a nurse. Is not that right.
A. Yes sir.
Q. And then later in the fall of 1900 he had another attack of ilious fever, so called, when Dr. Patton came over from McFall and ttended him?
A. I don't remember that time he had bilious fever.
Q. You remember he wasn't well?
A. I remember he wasn't well.
Q. Is it not a fact from the time of his wife's death he seemed to be sorrowing over it and was never quite as well afterwards?
02 A. I never though thought him just that way. I thought in 1902 he was fully recovered.
Q. In the fall of 1902 you thought he was fully recovered?
A. Yes sir.
Q. Up to that time he hadn't fully recovered?
A. He hadn't hardly.
Q. And seemed to be depressed and sick and feeble on account of vhat you attributed to his grief over his wife's death and to his sor- ow for her sickness and death that followed it?
A. I didn't think he seemed to be sick at all.
Q. He hadn't fully recovered?
A. He seemed like a man that was worried considerable about omething.
Q. That was true all along right up to the fall of 1902 when you ay he entirely recovered?
A. That is the way it seems to me.
Q. And you saw him quite regularly?
A. Yes sir.
Q. And he seemed worried you say?
A. Yes sir.
Q. And seemed depressed?
A. Yes sir.
Q. And that was his constant condition? Whenever you would see him you would notice that?
A. Not all the time.
Q. But most of the time you would notice that?
A. Most of the time.
Q. Where would you see him?
A. Well, I would see him at the place. I couldn't say where I seen him the most.
403 Q. You saw him around Weatherby all the time?
A. Around Weatherby, yes sir.
Q. Did he talk to you about his troubles?
A. No sir.
Q. You didn't know him so very well?
A. Well——
Q. Not in a social sense?

A. No, not in a social sense.
Q. When he was around Weatherby he spent a great deal of h
time in the store of De Hart & Riggs?
A. Yes sir; I have seen him there.
Q. More often than any other place?
A. I couldn't say he did.
Q. What other place did you see him? Mr. Rhoads' lumb
yard?
A. I have seen him on the streets and seen him in the postoffic
Q. He was not doing any particular amount of business durin
the last three years of his life except occasionally?
A. He was doing quite a good deal of business in the way
handling stock.
Q. And was co-operating with his brothers in that?
A. I think so.
Q. They didn't live in Weatherby but some distance out?
A. They lived out on the farm.
Q. Are you in any way related to the Roloson family?
A. No sir.
Q. You belong to the same lodge that he did?
A. Yes sir.

404 S. C. GARDNER was next called as a witness on the part
the plaintiffs and after being first duly sworn testified as f
lows:

Direct examination by Mr. HAYNES:

Q. Mr. Gardner, where do you reside?
A. I live in the north part of De Kalb county, Missouri.
Q. What is your business?
A. Farmer.
Q. To what extent? How much of a farm have you?
A. I have 120 acres at present.
Q. Do you deal in stock any?
A. Yes sir.
Q. Did you know Eber B. Roloson?
A. Yes sir.
Q. How long did you know him?
A. As near as I can remember about 25 years, perhaps a lit
more, longer than that.
Q. Now, we will go back, say 8 or 10 years, did you know h
then well?
A. Yes sir.
Q. Where?
A. I knowed him. He lived up in my neighborhood about t
time.
Q. How near to you?
A. Two miles.
Q. How often did you see him?
A. Well, it would be hard for me to tell. I would see him oc
sionally quite often.

Q. What did he do at that time?
A. Well, he was running a farm and shipping stock and feeding.
Q. What kind of a man was he in reference to action?
A. Well, he was a very active man.
405 Q. What do you say in reference to his strength and endurance for his size and build?
A. Well, he did a great deal of work. He went in almost all kinds of weather. He used to ride horseback and buy stock, and corn and do such work as that.
Q. From what you knew and what you saw of him doing all those things, what do you say in reference to his strength and endurance for his size and build?
A. Well, I thought he was fully an average man.
Q. Yes sir. Now, how long did he live there by you?
A. Well, sir, I don't remember just how long he lived there. He lived on the farm quite a number of years.
Q. Did you know him after he moved to Weatherby?
A. Yes sir.
Q. How often did you see him after he moved to Weatherby?
A. Not very often. I hardly ever go to Weatherby; probably three or four times a year. I would see him most every time I would be there.
Q. Do you remember the occasion of his wife's death?
A. I was in Colorado from the fall of 1898 to 1900. I come back in the fall of 1900.
Q. During that time you didn't see him?
A. No sir.
Q. How often did you see him after you came back from the west?
A. I couldn't say. I saw him quite a number of times.
Q. What was he doing?
A. I would meet him on the street or in some of the stores. I usually met him on the street.
Q. What do you say in reference to his health?
A. There was not any change that impressed me in his health.
406 Q. Did you meet him and talk with him?
A. Yes sir.
Q. Did you notice any change?
A. No, material change; nothing that impressed me. No material change in his health.
Q. That would be 1901.
A. Yes sir; from 1901.
Q. The fall of 1900. Did you see him frequently after that down to his death?
A. No sir, not very often.
Q. How often?
A. Probably I would see him three or four times a year.
Q. Well at the times that you did see him after you returned from the west, what do you say in reference to his condition on down to the time you saw him the last time?

A. I didn't notice any decline in his health.
Q. Did you see him in the summer of 1902?
A. Well, it was either in the summer or fall of 1902 I met him in Maysville at the telephone meeting. I remember meeting him there and having a talk with him.
Q. In the summer or fall of 1902?
A. Yes sir.
Q. State his condition then?
A. He was very active; taking an active part in matters that day. Our meeting was in the court room and he was a stockholder in the telephone company and took quite an interest.
Q. Did you notice anything wrong with his physical condition?
A. I did not.
Q. How did it compare with his health when you knew him the years before?
407 A. I didn't notice any change, any particular change that impressed me at all.

Cross-examination by Mr. KERR:

Q. Then you never did from the first time you met him to the last time notice any change in him at all?
A. Nothing that impressed me.
Q. He was during that time a vigorous, robust, active man?
A. I never looked upon him as a robust man.
Q. As a matter of fact, didn't you look upon him as a delicate man?
A. A spare made, lean like man.
Q. A man might be robust and vigorous and still be a spare, lean man?
A. I wouldn't consider him a man like the type you mentioned. He was spare and slight.
Q. Will you say, sir, in your opinion Mr. Roloson was not always a delicate looking man? Was not the way you always thought of him, a sort of delicate man full of ambition and energy?
A. Yes sir; always full of ambition and energy.
Q. And kept up by his spirits and ambition?
A. He wasn't—I am not able to——
Q. Didn't he appear that way to you?
A. I don't know as it did.
Q. Will you say that he didn't seem to you to be a delicate looking many who was kept up by his ambition and energy?
A. No sir.
Q. How frequently did you see him after you returned from Colorado until his death? You have mentioned one time?
A. Not very often. I would see him occasionally at Weatherby. I didn't go there very often. Most of the times when I would go there I would see him. I would orten meet him on the street.
408 Q. How often after your return from Colorado did you meet him?
A. I couldn't tell.
Q. When did you first meet him?

A. I couldn't tell.
Q. You are sure of the year 1900?
A. That I returned, yes sir.
Q. And that you met him?
A. That I met him.
Q. What time did you return from Colorado?
A. The first day of October 1900.
Q. And soon after that you think you saw him?
A. I don't know when I did see him first after I come back. I did not keep a diary of my daily transactions and I couldn't remember.
Q. But speaking generally do you think it was soon after you came back?
A. I think I saw him during that winter.
Q. You are not quite clear? It might have been the next year?
A. Yes sir, that is so.
Q. Can you tell how frequently you did see him after that?
A. No sir, not exactly. I told you not more than three or four times a year.
Q. And that is as definite as you can make it?
A. Yes sir.
Q. How old a man are you?
A. 55 years old.
Q. And you knew him from what year?
A. I can't tell what year, but I have known him a long time, at least 25 years.

409 Questions by the COURT:

Q. Did you notice after your return from Colorado that he had any cough?
A. No sir; I never knew of him having a cough.

JOHN BENNETT, was next called as a witness in behalf of the plaintiffs and after being first duly sworn testified as follows:

Direct examination by Mr. HAYNES:

Q. Mr. Bennett, where is your home?
A. I live in St. Joseph.
Q. How long have you lived in St. Joseph?
A. Five years last September.
Q. What is your present business?
A. I am in the commission business, selling cattle. South St Joseph.
Q. South St. Joseph stock yards?
A. Yes sir.
Q. How long have you been in that business?
A. Five years.
Q. Where did you live prior to moving to St. Joseph?
A. Maysville, De Kalb county.
Q. What business were you in there?
A. I was in the stock business, buying and shipping stock.

Q. Buying and shipping stock. Did you know Mr. Eber B. Roloson?

A. Yes sir.

Q. When did you get acquainted with him?

A. My best recollection is about 1891 and 1892. I moved to Maysville in 1890 and I think I met him in '91 or '2.

410 Q. Were you postmaster there at the time?

A. I was postmaster there under Cleveland's last administration.

Q. How well did you get acquainted with Mr. Eber B. Roloson, that is, how often did you see him?

A. Not very often then. He didn't get his mail so I didn't meet him in the postoffice. He got his mail at Weatherby.

Q. Will you describe to the jury about his size.

A. Well, in my judgment I think he was a man 5 feet 9 or 10 inches tall, thin in flesh, that is, what we would call a spare made, lean man. He never was to say a robust looking man.

Q. From what you knew of him at Maysville and on down to the last time you saw him in the Stock Yards at St. Joseph what would you say as to his cimparative condition?

A. I never noticed any marked change outs*die* of the natural order and wear and tear that *that* come on a man in ten or 12 years.

Q. Taking into consideration his make and size, what would you say as to his activity in getting about his business?

A. What I seen of him—I went up to his place and saw him in Weatherby occasionally, and sometimes at the Stock Yards, he seemed to be on the move and go.

Q. What would he do at the Stock Yards?

Q. He was buying cattle there and taking them out home to feed, and having cattle and hogs shipped in.

Q. What was his condition of health when you saw him at the Stock Yords? What did he do there about getting around?

A. I never noticed—I didn't notice anything wrong with him at all. I traded with him some, sold him a few cattle and talked to him quite often trying to sell cattle—I was selling cattle and he was buying and shipping. There was nothing to make me special attention, nothing attracted my attention; he seemed to be

411 going on like other men.

Q. When was the last time you saw him?

A. He bought cattle in August and September 1902 and maybe October. Anyway it was after the Western cattle came in.

Q. Do you mean 1902?

A. I mean 1902.

Q. You saw him in the Yards?

A. Yes sir, and talked with him; tried to sell him some cattle.

Q. That was in the fall and summer.

A. It was sometimes I would say in the months—I would say from August to November, but just what month it was I couldn't tell you. I could tell you on one special day by looking at a special sale that I sold to a man in the country.

Q. Did you see Mr. Roloson after that?

A. I don't remember that I saw Mr. Roloson after late in the fall or not. I may have seen him but I don't remember.

Q. Now, going back to when you first got acquainted with him at Maysville and passing on down to the time you now say you saw him at the Stock Yards, tell the jury whether or not he had a cough?

A. I never heard Mr. Roloson cough in my life. I never heard him complain, but I would meet him just as I would meet any other gentleman, in going to his place to buy a bunch of cattle of him and so on. I had no occasion to be around him outside of that.

Cross-examination by Mr. KERR:

Q. Mr. Bennett, did you ever ask Mr. Roloson to go out in the country and look at some cattle for you? You and he had business dealings together, didn't you?

A. I don't remember of ever asking him to go look at cattle for me. It may be. I won't say I didn't. I don't remember.

412 Q. You used to buy cattle?

A. Yes sir, I bought cattle and hogs.

Q. And you bought in the neighborhood in which he lived?

A. All over the country, first one place and another.

Q. Do you remember of his having talked to you about selling cattle and hogs that other people had for sale, or did he confine his transactions to what he had himself?

A. He confined his transaction to what he had himself as far as my business was concerned.

Q. But occasionally you have had men to go out and inspect cattle and hogs for you?

A. Yes sir, but Mr. Roloson never did.

Q. Do you remember whether you ever asked him if he would go and look at cattle and hogs for you in De Kalb county?

A. I don't remember.

Q. Was he what you would call a vigorous looking man?

A. No sir; what I would call a spare made, lean looking man.

Q. A delicate looking man?

A. He never was a strong looking man. I had no opportunity to find out what his strength was. I was not with him enough to know about it, but he was a spare looking man.

Q. How long had you known him?

A. Since 1892 I think. It may have been 1891.

Q. How much did you see of him during the last five years of his life?

A. The last five years I have seen more of him in St. Joe than I ever seen before when I met him in Weatherby.

Q. Would you say you had seen him 10 or 12 times?

A. Yes, I would say so.

Q. Have you seen him more frequently than that?

413 A. More often than that I would judge.

Q. Did you have social relations with him?

A. No purely business.

Q. And your interviews with him would be short?

A. Never passed outside of business transactions. He would come

in and sit down and we would talk awhile and I would try to sell him some cattle. Cattle men generally don't have time to sit around and parley very much.

Q. Do you think he was as vigorous during the years 1901 and 1902 as he was in 1899 and 1900?

A. I never noticed any marked change. He was looking 10 or 12 years older. He might have been just as strong and he might not. I never noticed anything to attract my attention to his being sickly, or anything different from what he had looked. He never looked strong.

Q. Can you fix the date of his last visit any more definitely?

A. No sir, it was in August or September, but I can't remember what month.

Q. Do you remember a gentleman visiting you at the Stock Yards awhile after his death?

A. I remember a man coming to see me.

Q. Is your recollection clear as to what he said and what you said at that time?

A. My recollection is ordinarily good.

Q. Did you not say that you were not surprised at the death of Mr. Roloson; that it looked as if it was coming?

A. I don't remember if I said it. I wouldn't swear.

Q. That was the tenor of your conversation?

A. I don't remember the conversation; it may be.

Q. That was the way you felt when you heard of his death?

414 A. No, I didn't know anything about him. Only being weakly, being a spare-made man I wasn't surprised. I wouldn't be surprised at myself going that way. I am not very strong myself.

Q. When this gentleman came and talked with you, you talked with him and told him you were acquainted with Mr. Roloson; what you had to do with him, and explained all your business relations, and he told you what day he had died and the circumstances concerning his death?

A. I don't remember particularly. I know he come there to see me and I talked with him. I didn't think I gave him very much encouragement.

Q. No, you were a friend of Mr. Roloson's?

A. No sir, not a particular friend.

Q. Is it not a fact that you said in substance, "I am not surprised at Mr. Roloson's going off; he looked as if it was coming the last time I saw him?"

A. I don't remember. I don't remember so expressing myself. I wouldn't be surprised to see a good many thin fellows drop off at any time.

Q. So the fact is that you were not surprised to hear of his death at the time he died?

A. Not specially so.

Redirect examination by Mr. HAYNES:

Q. This man who came to see you was representing these insurance companies?
A. I guess he was.
Q. And he said his name was Smith?
A. I think his name was Smith.
Q. He was a heavy set fellow?
A. I remember he was a heavy built man.
415 Q. And he was representing the insurance companies?
A. Yes sir.

FRANK BROWN was next called as a witness in behalf of the plaintiffs and being first duly sworn testified as follows:

Direct examination by Mr. HAYNES:

Q. Mr. Brown, where do you reside?
A. I live in Maysville.
Q. Maysville? That is in De Kalb county?
A. Yes sir.
Q. Is the town of Weatherby in De Kalb county?
A. Yes sir.
Q. How far is it from Maysville?
A. About 8 miles.
Q. East?
A. A little northeast.
Q. How long have you lived in Maysville?
A. Since 1893.
Q. Since 1893?
A. Yes sir.
Q. Where did you live before that?
A. I lived in Dallas township, De Kalb county, northeast part of the county.
Q. What were you formerly engaged in?
A. Farmer.
Q. What are you doing now?
A. Selling lumber in Maysville, retail lumber business.
Q. Do you occupy any official position in the county?
A. Yes sir; I am county treasurer.
416 Q. Did you know Eber B. Roloson?
A. Yes sir.
Q. When?
A. I have known Mr. Roloson from the year 1876.
Q. And you knew him on down to his death?
A. Yes sir; I knew him until he died.
Q. Now, how near did you live to him?
A. When I was on the farm, I used to live in two and a half or three miles of him.
Q. How long did you live that near to him?
A. About ten years.
Q. That would bring it down to about what time?

A. About 1903 I left the farm.
Q. You mean 1893?
A. Yes sir, 1893.
Q. Now during that period of time down to 1893 how often did you see him?
A. Oh, I couldn't tell hardly. I seen him quite frequently.
Q. What was he engaged in?
A. He was engaged in farming and trading in stock, feeding and handling cattle and hogs.
Q. What size man was he?
A. Well, I would judge he would weigh about 135 or 140; that would be my judgment.
Q. What kind of a build?
A. He was a spare made man.
Q. Taking into consideration his size and build, what would you say in reference to his strength for a man of his size and build?
A. Well, I would consider him a pretty average man in strength.
Q. You left the farm and went to Maysville?
417 A. Yes sir.
Q. Did you see him afterawrds?
A. Yes, I would see him once in a while, afterwards, perhaps two or three times a year, and sometimes in the country.
Q. Tell the jury the condition of his health and strength as far as you could observe at this time?
A. I never seen much change in Mr. Roloson.
Q. When did you see him last?
Q. When did you see him last?
A. I think the last time I saw Mr. Roloson was in about 1902.
Q. What time in 1902?
A. Well, that was along in the fall, sometimes along the first of November.
Q. Why do you say it was that time?
A. It was after the election; I was in the campaign that year.
Q. You were a candidate that election?
A. Yes sir.
Q. Where did you see him?
A. In the court house yard at Maysville.
Q. How did he appear?
A. Mr. Roloson was in failing health; he appeared sick.
Q. Was that about the time he was engaged in the cattle and hog business at Weatherby?
A. Yes sir, I think he was living in Weatherby then and was still in the cattle and hog business.
Q. That was a short time before he got sick?
A. He was sick then.
Q. That was a short time before his final sickness?
A. Yes sir.
Q. Well, the summer before that?
418 A. I never noticed much change.
Q. That was in the summer of 1902 before the election?
A. Yes sir.

Q. Where did you see him?
A. It would be hard to designate any certain point. I was in the campaign and around over the country.
Q. Did you see him?
A. Yes sir.
Q. In the summer of 1902?
A. Yes sir.
Q. Tell the jury that summer what the condition of his health was?
A. During the forepart of the sumer I didn't notice any change, nothing to compare with the change I noticed in the court house yard.
Q. Now, the summer of 1902 how was his health compared with his health when you knew him on the farm before that?
A. Well, it is a good while ago. I never noticed any particular change until I met him in the court house yard after the election.
Q. The fall of 1902?
A. Yes sir.
Q Did you ever discover any cough?
A. I never remember of him coughing. I don't remember of him coughing. I never noticed any.
Q. This time that you speak of when you discovered when his health was bad was after the election?
A. Yes sir.
Q. What was the date of the election?
A. It was the first Tuesday in November; I don't remember just the date.
419 Q. To refresh your memory wasn't the election the 8th of November?
A. Yes sir, last year, not that year. It must have been about the 4th.
Q. Do you know, Mr. Brown, personally whether or not at that time he had bought a large lot of live stock?
The COURT: When did you see him?
Mr. HAYNES: After the election.
A. I don't know as to the amount. My recollection is that he fed quite a good deal of stock that winter.

Cross-examination by Mr. KERR:

Q. Mr. Brown, how often would you say you had seen Mr. Roloson during the last four years of his life?
A. Well, I would see him three or four times a year; I don't think oftener than that, excepting possibly in the campaign a little oftener.
Q. You are speaking of the campaign of 1902?
A. Yes sir.
Q. Were you in the campaign two years before that?
A. No sir.
Q. Where did you live two years before?
A. I was living in Maysville.
Q. Did you engage in the stock business?
A. Earlier than that, I did when I was on the farm.

Q. Have you any recollection as to seeing Mr. Roloson during the year 1900?

A. Well, I met him only a few times. I think he was at my lumber yard a time or two. I met him at Weatherby I think once or twice. I noticed no material change in Mr. Roloson in 1900.

Q. In 1899?

420 A. I would have to say about the same.

Q. Did you have any social acquaintance with him?

A. Nothing further than meeting him occasionally. I was in Maysville and he lived in Weatherby at that time.

Q. Have you ever been at his house?

A. Yes. That is, I was on the farm, not where he lived at Weatherby.

Q. You remember the occasion of Mrs. Roloson's death?

A. I remember of hearing of her death, but that is all. I heard of it.

Q. Do you know anything personally about his sickness?

A. Nothing further than that I met him in the court house yard.

Q. That was in 1902 and she died in 1899?

A. No, I didn't know anything of Mrs. Roloson's sickness. I heard of it.

Q. You heard that she died but don't know about the time?

A. No sir.

Q. You spoke of meeting him in November 1902 in the court house yard. You say that was very soon after the election?

A. I wouldn't be certain but I know it was after the election.

Q. What was he doing?

A. I just talked a few minutes. He said he was sick and looked like he was sick.

Q. Do you remember whether that was the meeting of the stockholders of the telephone company?

A. I don't think it was. I think it was later.

Q. He never was a very robust looking man?

A. He was a spare-made man.

Q. A delicate looking man?

A. I wouldn't say particularly delicate, but a spare-made, light man.

421 Q. A man of ambition and energy?

A. Yes sir, he was an active man.

Q. You say that that was the first time, that that meeting in November 1902 was the first time you noticed particularly his failing health?

A. That was the first time I noticed his failing further than ordinary age.

Q. You don't know how long a time had intervened since you saw him before?

A. Not exactly. It was not such a very great while. Of course, I was in the campaign and saw him a number of times during the campaign.

Q. What was his particular appearance? Did he seem generally feeble?

A. That time in the court house yard? Why, I thought he had all the appearance of a man that was sick.

Q. What indications or appearances of sickness did you observe that time you met him in the court house yard?

A. Well, I couldn't say further than he said he was sick and he had all the appearances of being a sick man.

422 FINLEY MCCLURE was next called as a witness in behalf of plaintiffs, and being duly sworn testified as follows:

Direct examination by Mr. HAYNES:

Q. Mr. McClure, where do you live?

A. In De Kalb County, Missouri.

Q. In what part?

A. I live about 9 miles north east from Maysville.

Q. How near Weatherby?

A. Four and a half miles.

Q. Are you a farmer?

A. Yes sir?

Q. Did you at any time within the last few years hold any official position in the County?

A. Yes sir.

Q. What?

A. Member of the County Court.

Q. Did you know Eber B. Roloson?

A. I did.

Q. When did you get acquainted with him?

A. I think it was in 1874 I went to school to him.

Q. Now after you quit going to school to him what did he, after he quit teaching school what did he engage in?

A. He engaged in farming.

Q. How near you?

A. It was possibly about five or six miles.

Q. For how long?

A. I couldn't state how many years Mr. Roloson was engaged in farming. Part of the time he was buying stock and feeding cattle.

Q. Did he live that near to you for several years?

423 A. Yes sir, he has lived there on the farm, or at McFall or Weatherby, during all these years.

Q. Describe his physical being to this jury when you got acquainted with him, went to school to him?

A. Well sir, he was a man I should judge that would weigh 135 to 140 pounds, and his height was five feet, 8 or 9 inches, or near that I should judge; he was not a man that carried any surplus flesh: he was a lean man, always was.

Q. Take into consideration his build, and size, what would you say in reference to his strength?

A. I would say that he was an average of a man of that build.

Q. How long, in your recollection, did he continue to be that way?

A. I never knew of Mr. Roloson having any sickness until a short time after the death of his wife, I think it was, he had a bilious

attack, that lasted him a few days, and I knew of him having another sickness.

Q. You remember the sickness that followed his wife's death?

A. I think it was following his wife's death he had a few days sickness.

Q. Did you see him during that time?

A. What time?

Q. During that sickness.

A. No sir.

Q. Did you see him after he got out?

A. Yes sir.

Q. Now in that sickness, if she died in 1899, and that sickness was in 1900 following, did you see him in the summer of that year, 1900.

A. Yes sir, I saw Mr. Roloson, every year during these periods.

Q. Now take the summer of 1900 for instance, where did you see him?

A. I saw him in Weatherby; I have saw him in Maysville,
424 and I have met him on the road going to and from his place.

Q. Now in the summer following 1900, and thence on, tell the jury in reference to his health and strength?

A. So far as I know the sickness referred to is the only sickness I know of Mr. Roloson having.

Q. Can you state to the jury from what you knew and saw of him, whether he recovered from that or not?

A. I think he did.

Q. To what extent?

A. I would consider that he had regained his normal strength.

Q. Do you remember the occurrence of his death?

A. I do.

Q. Take the summer before he died Feb. 28th, 1903, take the summer before, on down until, in November and December, did you see him?

A. Yes sir.

Q. Where?

A. Well, it would be hard for me to name the time and places, and designate them and fix them in my mind as I have no memoranda to refer to.

Q. Do you have in your mind now,—did you see him often during that time, or not?

A. I usually met him in Weatherby the same as I would meet other people when I went to town.

Q. Take him as you saw him in the summer, and early Fall of 1902 what was his condition as to health and strength?

A. As to what time?

Q. Down to the Fall of November and December of 1902?—do you know that he was in the cattle and hog business at that time?

A. I do, yes sir.

425 Q. Now on down to the time of his reverses, if you heard of it.

A. The condition of his health, during that season Mr. Roloson

was engaged quite extensively in buying hogs and cattle, I do not remember the number of head, but I think he had something over 300 head of cattle.

Q. That was in the fall or winter of 1902 and 1903—preceding that, just before that, the summer or early fall, what was the condition of his health?

A. I thought he was normal: I did not see any thing to indicate that he was not.

Q. Did you ever discover any cough?

A. That is a hrad question to ask, if I ever heard a man cough.

Q. I will put it in this way: did he have a cough so that you noticed it that is, an incessant, or constant cough?

A. No sir.

Q. And thing of that kind?

A. No sir, he had not.

Q. You mean to say if you did hear him cough, it was simply as you will ordinarily hear men cough?

A. Yes sir, but he had no persistent cough.

Q. I will ask you this one general question: from the summer of 1900, which was the summer following the death of his wife, state to the jury whether or not you discovered at all times that you saw him, any thing whatever that indicated to you, or convinced you that he was in a bad state of health, or had lost any of his physical strength, and endurance?

A. At the time I refer to, sickness I refer to?

Q. That was following his wife's death.

A. Yes. After he had gained a normal condition, I thought Mr. Roloson was in his usual health, until his final sickness came on.

426 Cross-examination by Mr. KERR:

Q. How frequently would you say you saw Mr. Roloson during the year 1900.

A. I would not say how frequently. I usually go to town, usually did my business in Weatherby, but as to how often, I would not attempt to say how often.

Q. You can not even estimate it?

A. No sir, I would not place an estimate on it. I go to town as other farmers do, and do my trading and business.

Q. You have no particular necessity of seeing him, but met him casually sometimes when you went to town?

A. Yes sir, meet him, he was engaged in the stock business, and during part of that period, I myself was interested in the stock business.

Q. Can you tell us how often you saw him during the year 1899?

A. No sir, I would not say how often I met him.

Q. Or any of the subsequent years?

A. I will say I met him quite often.

Q. And always at Weatherby?

A. No sir, not always at Weatherby.

Q. Where else did you meet him?

A. I have met him in Maysville, and on the road different places.

Q. You were quite an intimate friend of hi-, I take it Mr. McClure.
A. You might term it so. I went to school to him in my boyhood days, and have known him ever since.
Q. His family and your family are quite friendly.
A. I supose we are.
Q. Exchange visits?
A. No sir, never visited him.
Q. Did you know Mrs. Roloson?
A. I had a speaking acquaintance with Mrs. Roloson, is all.
427 Q. Did you and he belong to any orders together?
A. I never met Mr. Roloson in a fraternal way in my life, no sir.
Q. You have mentioned a sickness of his in the winter following Mrs. Roloson's death—you can't fix the date of that sickness any more accurately?
A. No sir, I could not.
Q. Two or three months after her death?
A. I would not say whether it was 2 or 3 months', or longer.
Q. Would you say it was in the winter or summer.
A. I would not attempt to fix the time, but I know it was about that time; about, or after the death of his wife.
Q. Shortly after?
A. I should judge so.
Q. That is about the best you can say about it?
A. Yes sir.
Q. After he was able to get out after that sickness, you didn't notice any change at all.
A. No sir, I did not notice that there was any thing unusual after he had regained his normal condition from his sick spell.
Q. How long was it after the sickness, in your opinion, before he regained his normal condition?
A. I could not say.
Q. How long a period elapsed then while you did not see him.
A. I would not attempt to approximate it.
Q. Will you say then that he did regain his normal condition inside of a year after that sickness.
A. Inside of a year from the time of that sickness?
Q. Yes.
A. I would, yes sir.
Q. And you say then that in a year from that time he had
428 absolutely recovered from it?
A. So far as I could discern, yes sir.
Q. Did you ever notice that he had an appearance of despondency after his wife's death, looked despondent, sad?
A. Mr. Roloson was a man that thought a great deal of his family but I never talked to Mr. Roloson in regard to his wife's death.
Q. As a matter of fact, you know he did think a great deal of his wife?
A. I have heard he did.
Q. And he was with her constantly during her last sickness?
A. That is my understandi-g.

Q. Worried him a great deal, and he continued to worry about her sickness and death, during the remainder of his life?

A. I could not say he did.

Q. He never mentioned it to you?

A. No sir.

Q. Talking about his appearance, ever after her death didn't he have a worried look?

A. I could not say that he did. He was quite jovial at times when I would meet him: He was a man that was quite jovial.

Q. Would you describe him as a vigorous man, or a delicate man?

A. It is hard to draw a distinction between those two. I would say he was a man possessed of great activity and vitality for a man of his build.

Q. But withal, rather a delicate man.

A. No, I would not call him so.

Q. Rather a robust man?

A. No sir, he was not robust. He was a lean, fair man. Wiry, and full of vigor, active.

Q. Would you say he was not a delicate looking man.

429 A. Delicate looking?

Q. Yes sir.

A. His general appearance would not indicate a man the physique of yourself, no, if we take flesh to indicate strength.

Q. No, not necessarily. When did you see him last before his death.

A. It was just a short time before his last illness?

Q. Can you fix the time?

A. No, I can't fix the time definitely, but it was a very few days before his last illness.

Q. How do you come to fix the date of his last illness?

A. Well, if the Court will permit me——

The COURT: Yes, go ahead, and tell.

A. Mr. Roloson and I each had some accidental insurance in the Fraternal Bond, he and I sent in our amounts at the same time; he had advanced a payment for me, and I remember of paying it to him the last time I met him.

Q. I am trying to get at the period of the year.

A. It was late in the fall season, or early winter seems to me; latter part of November or December to my best recollection.

Q. The last time you saw him.

A. Yes sir.

Q. Have you any data which would enable you to say absolutely what was that date?

A. No sir.

Q. Where did you see him on that date?

A. Saw him at the post office.

Q. And he was ailing then was he?

A. He was not feeling well, no sir, at that time; that was just prior to his final sickness.

Q. How are those premiums payable on those bonds, monthly, or annually, or at what stated time?

430 Mr. RANDOLPH: We object to that.

The COURT: He is trying to fix the time.

Q. When were the premiums at that time due, monthly, or yearly or what other stated times?

A. Monthly.

Q. Did you remit by post office order, or check, or how?

A. I think I gave him the money, is my recollection.

Q. Gave it to Mr. Roloson?

A. I was paying an assessment that he had advanced for me.

Q. You have no way of fixing the date?

A. None whatever.

Q. Are you in any way related to the Roloson family?

A. Yes sir, Mr. Cashius Roloson married my sister—only by marriage.

BEN SHELMAN, was next called as a witness on behalf of plaintiffs and being duly sworn testified as follows:

Direct examination by Mr. HAYNES:

Q. Where do you reside?

A. Near Weatherby, De Kalb county, four miles from Weatherby.

Q. Which way.

A. North west.

Q. What is your business.

A. Farmer.

Q. To what extent.

A. I farm 480 acres of land.

Q. Are you a stock man?

A. Somewhat.

Q. Did you know Eber B. Roloson?

A. I used to know him in his life time.

431 Q. When did you get acquainted with him?

A. I think it was the winter of 1875, or 1876. He taught school down there the first I was acquainted with him.

Q. Did you go to school to him?

A. No sir, but I was there; he used to give school exhibitions.

Q. How long did he live there in that neighborhood?

A. Well, after he quit teaching school I think he engaged in farming.

Q. Near you?

A. 7 miles I would think from me.

Q. Did you ever have any business transacti-ns with him at any time.

A. Yes sir. I bought a load of feeding cattle of him once?

Q. When.

A. I couldn't tell; some 15 years ago.

Q. How often did you see him in the last 8 or 10 years?

A. After he moved to Weatherby I seen him about every time I would be to town, sometimes be there once a week, sometimes once in 2 weeks.

Q. Before he moved to Weatherby how often did you see him?

A. Didn't see him so often then.
Q. What was his physical description as you saw him?
A. He was a very spare built man; rather slim.
Q. For his size and build, what do you say in reference to his strength, when you got acquainted with him?
A. For his size and build he seemed to have as much strength as the ordinary man would.
Q. What would you see him do?
A. I know when I bought the cattle of him it was a very cold, stormy day, and he was out showing me the cattle, and liked to freeze me out.
432 Q. In reference to getting around, and being active, tell the jury.
A. He was pretty spry, always, I seen him about Weatherby when there would be stock shipped there.
Q. When did you see him last in Weatherby?
A. I couldn't tell when.
Q. You say you saw him at Weatherby after he moved there, at times when they were shipping stock. What did he do.
A. He would be around, people would congregate around the stock yards, be passing their opinion on the stock, and he seemed to be a dear lover of stock.
Q. When was that.
A. Different times when I would be there.
Q. How late did you see that before his death?
A. I seen it in the summer, before his death. I know I took down some hogs there in the summer before he died, and he was there I think.
Q. What was his condition then?
A. He was around as peart as common I think.
Q. Compared with his condition before that time, when you say he was up on the farm?
A. Well, of course he aged, but outside of his age I could not say that he was not about as peart the last time I seen him as he was any time I seen him the last 10 years; of course he showed his age somewhat.
Q. Now did you see him in 1900, in the fall of 1900.
A. Well, now, I paid no attention to when he was there, but after he moved to Weatherby I would see him most every time I was in town.
Q. Do you remember the occasion of his wife's de..th?
433 —. ——.
Q. Now do you know whether or not following that, that he had a spell of sickness?
A. I heard that he had. I know there was a while there that I would not see him when I was at Weatherby, for a month or six weeks.
Q. Do you know if that was in the winter or spring of 1900?
A. I could not tell you when.
Q. If that was in th- winter, or spring of 1900, then after that did you see him?

A. Yes sir, I seen him after his sickness, after the death of his wife.

Q. How long after?

A. Oh, it had been, well, I don't recollect just the time.

Q. Did you see him the summer of 1900?

A. I seen him I know after the death of his wife, not a great while. I heard of his sickness, and then after that he got up after that spell I seen him about as frequent as common about town.

Q. After he got up out of that spell, on down to his last sickness how often did you see him?

A. I would say every 2 or 3 weeks.

Q. Did you discover any thing wrong with him, physically.

A. No, he was always on the move.

Q. H-w did he appear to be, as far as strength and getting around was concerned.

A. One time I know I was going down to Weatherby, I went right past his house, he lived right on the road, and he had a load of lumber on his shoulder, and I kind of laughed at him and said are you running a dray line.

Q. What was he doing with that lumber?

A. There was a crib being built on his lot.

434 Q. In the town of Weatherby?

A. Yes sir. I just laughed at him and said "Are you running a dray line?" He said "I'm running this part of it."

Q. What time in the year was that?

A. In the late Fall I think, or early Winter.

Q. 1902?

A. I think it was.

Q. Did you ever discover any cough?

A. I have no recollection ever hearing him cough.

Cross-examination by Mr. KERR:

Q. Mr. Sheldon, can you give us any more definite idea as to how frequently you saw Mr. Rol-son during the last five years? Take the year 1899—how often did you see him?

A. I couldn't tell you, only as I said when I would be at town; I went right past his house and would either see him up in town or going back or while in town.

Q. How often would you be in town?

A. I wouldn't average over once every two weeks.

Q. And that was true of the year 1899, 1900, 1901 and 1902 I suppose?

A. Yes sir, ever since he moved to Weatherby; I would see him I know pretty near every time I would be in town.

Q. You were quite an intimate friend of his?

A. No, no more than any other neighbor; I was no intimate of his.

Q. Visited his house?

A. No, except the time I was on the farm when I bought the cattle, and I wasn't in the house that time; I went up there one stormy day and we traded.

435 Q. He never looked to be a vigorous man?
A. No, never looked like he would make a prize fighter.
Q. Looked a little bit delicate?
A. Always like what I would call ordinary, scrubby.
Q. Not quite as strong as he might be?
A. Didn't look as strong just from general casual appearance; didn't look as strong as he was from the amount of labor he performed.
Q. An active, ambitious man?
A. Seemed to be.
Q. All he lacked was the strength to keep pace with his ambition?
A. He kept pace—if you kept up with him you would think he was going.
Q. Do you remember the first time you saw him after his wife's death?
A. No, I couldn't fix no dates.
Q. You remember he had a sickness after her death?
A. I heard of it.
Q. You remember seeing him after that sickness?
A. Yes sir.
Q. You saw it—in fact he looked as if he had had a spell of sickness?
A. Oh yes, right away the first few times I seen him he looked bad.
Q. And for some time after he showed the effect of that sickness?
A. He gradually got over it but showed he had been sick.
Q. Then you know he had another spell of sickness in the Fall of that year when Dr. Patton attended him?
A. I couldn't say; I heard he was sick when it was;
436 whether he had more than one I couldn't say.
Q. This second spell kept him down for still longer?
A. I have no recollection of hearing of him being sick but the one time, although he might have been; he couldn't have been sick very long, not more than a couple of weeks, because I know I didn't miss him off the streets.
Q. You knew he had a great affection for his wife?
A. I suppose so; any man should have.
Q. Every domestic man. Now is it not a fact that after the death of his wife he seemed to be never quite the same?
A. For a short time afterwards seemed considerably cut down.
Q. Very much depressed?
A. Seemed to be.
Q. As a matter of fact never quite got back to his former self, seemed to be sorrowing and depressed and dejected throughout the remainder of his life?
A. Not so much so the last years before he was taken down, he seemed like he kind of rallied. He did look dejected for a short time, very much so.
Q. You think towards the last he improved again?
A. Seemed like he did; seemed like he took more ambition. When I seen him building that crib—I thought to myself after his wife's

death, thinks says I you won't be here long, that was my impression, but after I seen him building that crib and taking the interest he seemed to take in his business, I thought then that he was getting over it.

Q. This crib was built you would say in the Fall of 1902?

A. I think it was, the early Winter, it is my impression.

Q. The Winter of 1902 and 1903, just before he died?

437 A. Yes, I think it was; I am not positive about that; I know it was a little late; because there was parties wanting to sell corn and they had asked me if I wanted to buy corn; says I—they was nearer to Weatherby than to my place, and says I, can't you sell it to Roloson? Says he has no crib. He built it a little late for corn gathering, that is not for late corn gathering but for early corn gathering.

Q. Up to that time you expected him to follow the way his wife had gone?

A. Yes sir.

Q. Then when you saw him building the corn crib you said Roloson is beginning to pick up again?

A. Yes sir, I thought so.

Q. And the next thing you heard he died?

A. Heard he was sick, and he never recovered.

Q. That is the last sickness to which you refer?

A. Yes sir.

Redirect examination.

By Mr. HAYNES:

Q. I want to ask you what it was caused you to think immediately following the death of his wife that he might follow her, whether it was grieving over her or sickness?

A. I thought he was grieving himself to death, is about the way I had it fixed up.

Recross-examination.

By Mr. KERR:

Q. From his general appearance?

A. Yes, he looked like he was kind of despondent. I know one time, I couldn't say just how long after, I was in the hotel real early one morning; there was a fellow going off on the early train and I got there before daylight, very early, and Mr. Roloson come

438 in, his little girl was with him; it was a chilly morning, it was the first I knew he wasn't keeping ho-se and I made the remark "Does Mr. Roloson stay here?" Some — in there says "Him and the little girl sleeps at home but they get their meals here; the little girl didn't look to be over five or six years old.

Re-redirect examination.

By Mr. HAYNES:

Q. Is Lucy here, the little girl?
A. Well, she wasn't near so large, I suppose, that looks to be the same girl.
Q. That was following his wife's death?
A. Yes.
Q. That was in the early part of 1900?
A. I couldn't tell how soon.
Q. She died in the Fall of 1899.
A. He was living then I think in Mr. Harper's house.
Q. Now how soon after that was it until you noticed he had recovered—the following Summer?

Mr. KERR: We object.

A. I couldn't tell how long, but after that it seemed six or eight months.
Q. You thought he had fully recovered?
A. I thought so from the way he got about business again.

Mr. ELLIS was next called as a witness in behalf of plaintiffs and being duly sworn testified as follows:

Direct examination.

By Mr. HAYNES:

Q. Mr. Ellis where is your home?
A. South east of Maysville three miles and a half or four miles.
439 Q. How long have you lived there?
A. I moved there about 18 months ago.
Q. Where did you live prior to that time?
A. I lived in Daviess County.
Q. Did you know Eber B. Roloson?
A. Yes sir.
Q. When did you get acquainted with him?
A. Why from 16 to 18 years ago, I wouldn't say to the date at all.
Q. Where did he live at that time?
A. He lived in Weatherby, buying stock and shipping; I sold him some cows the first time I ever met him.
Q. Will you tell the jury about his ability the time you first saw him to get around and transact business, his physical ability.
A. Why, it seemed good, never noticed anything to the contrary.
Q. What was his build?
A. Why his build was, looked to me like he was five feet six inches high, to eight; weighed about 135 to 140 pounds.
Q. Was he a fleshy or thin man?
A. He was just what I would call an ordinary man, raw-boned.

Q. Taking into consideration his size and build and what you saw of him and knew of him, what would you say as to his strength and endurance?

A. As good as any ordinary man of his age.

Q. When did you see him last?

A. I seen him the last I think it was in 1903, the last time I saw him.

Q. Just about the time of his death?

A. Just before his death.

Q. Now if he died February 28, 1903, when did you see him?

440 A. Well, I passed by the house and seen him looking out of the window, he was expecting his cattle, cattle that was coming west about a quarter of a mile, and he was propped up looking out of the window.

Q. That was the early part you think of 1903?

A. 1903, February I think it was.

Q. Take the Summer before that, did you see him?

A. Yes sir.

Q. Where?

A. Seen him in Weatherby.

Q. What was he doing?

A. Transacting business, first from the farm and down around his place.

Q. What was his appearance in reference to his health and strength?

A. Good as any ordinary man I had acquaintance with of his age.

Q. Do you remember the occasion of his wife's death?

A. Yes sir, I do, I heard of it.

Q. Now if she died in October 1899, do you, or do you not, remember that he had a spell of sickness following her death?

A. I heard he had it.

Q. Now did you see him the Summer following her death?

A. Yes sir.

Q. Where?

A. The next Summer after his sickness.

Q. Where?

A. In Weatherby.

Q. Now what do you say was his condition then?

A. I couldn't tell any material difference in him from the time before his sickness when I first got acquainted with him, only

441 knowing his age, he was getting a little older.

Q. From the Summer of 1900, which was the summer following his sickness after the death of his wife, down to this last sickness, tell the jury whether or not at any time you discovered anything wrong with his health or strength or activity?

A. No sir, never could, up till his last sickness.

Q. Did you ever hear him cough?

A. I never did.

. Mr. Roloson lived in Weatherby twice, didn't he?
. Yes sir.
. You said 18 years ago—you had reference to the first time?
. Yes sir.
. Then he moved to the farm and moved back again?
. Yes sir.
. Did you ever sell him any stock?
. Yes sir.
. When?
. I sold him stock in 1901, I think; December or November, and some in January 1902.
. Where were they loaded?
. They was loaded at my place.
. Who was there?
. Well, the first we loaded we sold him 30 head I think it was of ts.
. Where did you haul them to?
. To his farm.
. Was he along?
. Not the first time; the second time; he made another deal, bought some larger size.
Q. The first time did you haul them to his farm?
A. Yes sir.
. Was he at home?
. No sir.
. Was he the second time?
. The second time he was at my place; he came to pick the hogs
. What size were they?
. I had thirty head of hogs, running from 75 to 100 lbs, I it.
. You loaded them into a wagon?
. He come out to see me about buying them; I told him I would him the pick.
. Did he buy them?
. Yes sir.
. You had to deliver them to him?
. Yes sir.
. How did you do that?
. I hauled them in a wagon.
. Was Roloson there?
. He was there the last load.
. What did he do in reference to loading them, if anything?
. I got up in the morning I guess between five and six o'clock was kindling the fire when I heard a tap on the door. I opened door and there stood Mr. Roloson. He says Its a long ways to farm and we'll have to get out and pick them hogs and get out them. I kindled the fire, hooked up my team, fed my team fixed my wagon. I solicited him to come and get some break- He said he'd been; solicited him to come to the fire, but he

said No, he would run round and look at the stuff. I got my
443 breakfast and then we drove the 30 head into a small pen. I backed my wagon up and I says "What'll you give me a pound for all——

Q. Did you sell him the hogs?
A. Yes sir.
Q. How did you get them into the wagon?
A. I kept the end gate in the wagon and he put them in.
Q. How much would they weigh?
A. I don't know—I sold them at $5.00 a head.
Q. Did he catch them in the little pen?
A. Yes sir, catched the 30 head and throwed them in the wagon.
Q. While you held the end gate?
A. I held the end gate.
Q. That was the last time—the early part of 1902?
A. January, best of my recollection, latter part of January.
Q. Did I ask you in reference to a cough, whether he had a cough, did I ask you about that?
A. Yes sir.
Q. What was your answer?
A. I never heard him cough to the best of my recollection.

Cross-examination.

By Mr. KERR:

Q. This last event you have described took place in January 1902?
A. Yes sir.
Q. And you held the tail-board while he went around and caught the hogs?
A. Just had a small pen. I says "Now Mr. Roloson"——
Q. You have told the story, please answer the question. Is that a fact?
A. Yes sir.
444 Q. Just caught them as he wanted them and threw them in without assistance?
A. Once in a while I would help, I was holding the end gate and one would be kicking I would held put it in.
Q. How long did it take him to do this work?
A. I don't know.
Q. How many hogs were there?
A. I think I had 30 head.
Q. That he bought?
A. No sir, bought ten of them.
Q. How long after that was it before you saw him again?
A. I saw him from once to twice a month, sometimes only once a month.
Q. Continuously up to the time of his death?
A. Yes sir.
Q. Had you seen him as frequently as that from the year 1899 on?
A. No sir.
Q. How often would you say you saw him in the year 1899?

A. Sometimes might run, in busy crop time six weeks when I was working on the farm.
Q. During the year 1900?
A. The same.
Q. And 1901 and '02?
A. 1901 and 1902, yes sir.
Q. Where would you see him usually?
A. Sometimes when I was going in to Weatherby with stock, butcher stuff or fat cattle he would come to the yards; sometimes at the bank, sometimes at De Hart and Riggs's, sometimes at the lumber yard.
445 Q. No particular place, just as you met him casually?
A. No sir, no particular place.
Q. He seems to have been around the streets there a good deal, you saw him around the streets a good deal?
A. Yes sir, saw him on the street.
Q. Just apparently going around on the street greeting his friends?
A. No sir, he never taken much time greeting them; kept going; seemed like he always had business to attend to.
Q. What business was he engaged in—buying and selling stock and farming?
A. Buying and selling stock and farming.
Q. Do you remember the occasion of Mrs. Roloson's death?
A. I heard of it.
Q. Do you know of the sickness he had the Winter following?
A. I heard of it is all.
Q. You were seeing him once and twice a week during that time, during the early Winter of 1900?
A. I seen him as often as that if I went to town; sometimes run six weeks I didn't see him.
Q. You said during some periods?
A. Yes sir, if I was busy gathering corn.
Q. February and March are not particularly the periods you would be gone six weeks.
A. No sir, I shouldn't think so.
Q. What would you say about seeing him those months in 1900?
A. Oh, I guess I seen him certain parts of the year every week, sometimes be four weeks and sometimes two weeks.
Q. Did you see him more frequently than once in four weeks during the months of February and March 1900?
446 A. I couldn't say.
Q. Do you know anything about the sickness he had then?
A. No sir.
Q. You didn't notice the fact that he was sick?
A. Yes sir, after he got up I seen him around on the streets.
Q. Did he show then the effect of his sickness?
A. Yes sir.
Q. What time in 1900 did you see him around showing the effect of his sickness?

A. I think along in March or April.

Q. And he continued to show the effects of that sickness for quite a while, didn't he?

A. It didn't see mto last very long; next Summer afterwards seemed to be apparently as healthy as ever.

Q. The Summer of 1900?

A. Yes sir.

Q. Did you know of the sickness he had in the Fall of 1900?

A. Himself?

Q. His sickness in the Fall of 1900?

A. His wife?

Q. No, his sickness.

A. No sir, I don't.

Q. You don't know anything about that sickness?

A. I know he was sick after his wife died.

Q. His sickness in the Fall of 1900, a year after his wife died?

A. No sir, I don't.

Q. You would say, and do you say, he was as well in the Fall of 1900 as he was two years before?

447 A. Why, he apparently, all except this sick spell, he appeared to me his health was as good as ever up to the time he had that sick spell with his wife:

Q. I am talking about the Fal- of 1900, a year after Mrs. Roloson's death, and asked you if then he was as healthy and vigor-s as two years earlier.

A. Wel-, I couldn't say. In the Fall or not I don't recollect just the time he was sick, only sick in the spring, I know in the summer afte- his sickness his health was apparently good; spry getting around.

Q. Good at all times after that?

A. Until he was taken down til- his death.

Q. And you wil- swear that during the year 1901 he was at all times vigorous and healthy.

A. Yes sir, seemed to be getting around all right.

Q. Was he ever a vigorous man?

A. He was an energetic man.

Q. Is an energetic man necessarily a healthy man in your opinion?

A. Apparently as healthy, as good as any ordinary man I would meet and do business with; he got up and went.

Q. Was he not a delicate looking man?

A. No sir; not to me.

Q. Big, strong vigorous man?

A. No sir, an ordinary man, what I would call in health, of his Age.

Q. What was his color?

Q. Fair complexion.

Q. Was he not a pale complexioned man?

A. I would not call him.

Q. Would you call him a sallow complexioned man?

A. No, just fair, complexion same as any ordinary man,
448 same as any of the rest of us.
Q. Do you know of his building a corn crib in the fall of 1902?
A. I seen him carrying some boards down there is all.
Q. Didn't it surprise you?
A. I asked him if he was making a dray out of himself. I was driving some cattle in, and he set his boards down and looked at the cattle, and guessed at the weights. I went on down to the stock yards and he came down there.
Q. What time was this?
A. About 10 o'clock in the day:
Q. What day and what month?
—, ——,
Q. Was it in the Fall?
A. It was in December or November.
Q. 1902. It was at least that late wasn't it.
A. It was at least that late, I think it was.

WILLIAM CALDWELL, was next called as a witness on behalf of plaintiffs, and being duly sworn testified as follows:

Direct examination by Mr. RANDOLPH:

Q. Your name is Wm. Caldwell?
A. Yes sir.
Q. You live how far from Weatherby?
A. About a mile and a half.
Q. In which direction.
A. South west.
Q. How long have you lived in that community?
A. 21 years.
Q. Were you acquainted with Eber B. Roloson in his life time?
A. Yes sir.
449 Q. How long did you know him?
A. I got acquainted with him about 15 years previous——
Q. Was that during his residence in Weatherby?
A. Yes sir, the first time he lived there.
Q. Then he left there and afterwards came back again?
A. Yes sir.
Q. Did you have any acquaintance with him except during his two residences at Weatherby?
A. I remember once of seeing him between the two.
Q. Your particular acquaintance was with him at that time?
A. The last 4 years of his residence.
Q. Did you see him frequently during the fall of 1901, and the spring and summer of 1902.
A. Yes sir, I will say I did.
Q. What was his physical condition at that time, as compared with what it had been when you first knew him, with the exception of the natural inroads of age?
A. I would say about normal.

Q. The spring and summer before he died, and the Fall before that 1901, and 1902, would you say it was about normal?

A. Yes, I would say normal.

Q. How often did you meet him.

A. I was in town I suppose at least twice every week Mr. Randolph and I would generally see him I think.

Q. You have a farm there have you?

A. I have a farm there, yes sir.

Q. Now did he ever have a cough?

A. I never heard him cough to call my attention to it; not enough that I could recollect of any kind.

450 Cross-examination by Mr. KERR:

Q. What portion of your time from 1898 on, did you spend in Weatherby.

A. I am not a loafer in Weatherby; I go there 2 or 3 times a week on business, and don't stay but a little while.

Q. Your time is pretty well taken up attending to your own business?

A. Yes sir that is right.

Q. Were you transacting business with Mr. Roloson during this time?

A. Some little.

Q. Very little?

A. Yes sir.

Q. How frequently would you say you saw him.

A. I couldn't tell, probably almost every time I went to town

Q. You would meet him casually on the street?

A. Yes sir.

Q. And that would be the extent of your seeing him during those years.

A. Yes sir, once in a while on the highway, but not often

Q. Say how do you do and go-d day, and that would be about all?

A. Yes sir.

Q. Were you a social acquaintance of his to the extent that you visited him at his house?

A. Never visited him at his house but once.

Q. Before or after his wife's death?

A. After his wife's death.

Q. How long?

A. Why, it was that fall, not long after, shortly after, probably inside of a month.

Q. She died in October, 1899?

A. Yes sir.

Q. And it was shortly after that?

451 A. Yes sir.

Q. What was his condition then?

A. He was sort of depressed at that time, after his wife's death.

Q. Feeling pretty badly?

A. No sir, I can't say that, but he was in the house at the time

went there to see him. He had been around town I think a little that time.

Q. Was that before or after he had the serious illness where he had to have Mr. Leer to nurse him, if you know.

A. If he had any illness after his wife's death, or had a doctor I don't know.

Q. You would say that your visit was about a month after his wife's death.

A. I would say about a month.

Q. And he continued after this visit you mention, in about the same condition he was until the time of his final illness?

A. No, he got better; attained a normal condition after that. He was run down some after his wife died. He thought a great deal of his family, and I had a transaction with him, and the transaction it showed that he revered his wife's name.

Mrs. RIGGS, was next called as a witness on behalf of plaintiffs, and being duly sworn, testified as follows:

Direct examination by Mr. RANDOLPH:

Q. Give your full name.

A. Ella P. Riggs.

Q. You are the wife of Silas Riggs.

A. Silas A. Riggs.

Q. Not the Silas Riggs who testified, but this Silas Riggs sitting here.

452 A. Yes sir, that is my husband.

Q. He is a brother of Mr. Paul Riggs?

A. Yes sir.

Q. You are a sister of Mrs. Eber B. Roloson?

A. Yes sir.

Q. How long have you known Eber B. Roloson?

A. Since the summer of 1882.

Q. Was that the year he married your sister?

A. No sir.

Q. What year did he marry your sister?

A. In August, 1885.

Q. Have you been intimately associated with him and his family since that time?

A. Yes sir.

Q. How far do you live from Weatherby?

A. Mile and a half.

Q. And you were intimately acquainted with him all the time that he resided at Weatherby?

A. Yes sir, I saw him every few days.

Q. Now Mrs. Riggs, during 1901, the fall of 1901, and that following winter, and the spring — summer of 1902, what was his state of health?—that was the spring and summer before he died, and the winter before that?

A. Well, in the fall you say, in the fall of 1900, com-encing with 1900.

Q. No, 1901.

A. 1901? Well, in 1901 his health was better than in 1900, or even in 1899.

Q. Now what was it in regard to being in a normal condition or not?

A. Well, as late as 1901, his health was normal I thought.

453 Q. And how was it in 1902, the summer before he died?

A. Well, after 1900, I thought his health improved until the fall of 1902.

Q. Until his last sickness?

A. Yes sir.

Q. Was he in what you would call ordinary normal health?

A. He was, yes sir.

Q. You remember his sickness in 1900, do you, at the time Dr. Patton visited him?

A. Yes sir.

Q. And you mean after that it was that he gained his normal condition.

A. Yes sir, after a few weeks he regained his normal condition I thought.

Q. Did he drink coffee.

A. No sir.

Q. Do you know what he drank?

A. He drank water.

Q. Any thing but water?

A. No sir.

Q. What was his appetitte, as compared with the appetite of other men.

A. I called his appetite very good. He was peculiar about his eating. He didn't eat any vegetables, nor any des-erts; no pies or cakes.

Q. Pastry of any kind?

—. ——.

Q. Did he eat any kind of pie?

A. He would eat cu-tard pie, but wouldn't eat any fruit pie, no cakes, and no preserves, and didn't eat vegetables.

454 Q. What did he eat?

A. He ate bread and meat and butter principally, was his principle diet.

Q. What about eggs?

A. He would eat eggs if they were cooked just to suit him.

Q. What about articles made with corn meal?

A. He would eat corn bread if it was made in batter cakes, and baked in the frying pan, wouldn't eat it if baked in the oven.

Q. Had a peculiar appetite in that respect?

A. Yes sir.

Q. Was that during the 20 years you knew him?

A. Yes sir, as far back as I knew him, his appetite was peculiar; if he had *wah*t he wanted he would eat hearty; if he didn't have what he wanted he wouldn't eat it.

Cross-examination by Mr. Kerr:

Q. As a matter of fact, Mrs. Riggs, he ate very sparingly?

A. That depended upon what he ate, but if he had good biscuits and good meat and cooked right, I considered him a hearty eater, when he had what he liked.

Q. Your *brother* is a brother of Mr. Paul Riggs?

A. Yes sir; my husband is.

Q. What relation are you to Mr. McClure who was on the stand a moment ago?

A. I am no relation.

Q. You said a few moments ago that the health of Mr. Roloson seemed to be on the improve until the fall of 1902?

A. Yes sir.

Q. That is a fact is it?

A. Yes sir.

Q. And what is your recollection as to the time in 1902 when his final sickness be*a*gan?

A. I think it began the last of December. My recollection is the last of December.

Q. Then he had but regained his health when he was taken with this final sickness?

A. You mean had but recently regained his health?

Q. He had just regained his health in the fall of 1902 when he was taken with his final sickness?

A. No sir; I think he regained it nearly two years previous.

Q. You said he kept improving until the fall of 1902?

A. I said during the fall of 1900 after a few weeks in which he looked bad, he regained his natural and normal condition.

Q. Did you not a moment ago answer to me that he kept
456 mending until the fall of 1902?

A. Well, I don't know that I did that, but I think that during the summer of 1902 that he gained in weight and looked better than he had since his wife had died.

Q. Now, that is clear in your mind, is it not?

A. Yes sir.

Q. Until the summer of 1902 he kept improving until at that time he looked better than he had at any time since his wife died?

A. I don't say he improved all along after his wife died. I say in the winter after he had this spell of sickness he was better and regained his normal condition, and in the summer of 1902 I thought he had looked better than I had ever seen him, or better than since his wife's sickness.

Q. Now, in that summer of 1902 you say he got back so he looked as well as he did before his wife died, and not until that time?

A. No sir. I said—he looked as well prior to that time, but during the summer he looked better than he had since his wife's last sickness.

Q. During the summer of 1902 he looked better than he had at any time since his wife's last sickness?

A. Yes sir.

Q. Immediately after his wife's death he was not well, was he?

A. Well, he didn't say that he was not well.

Q. Speaking of his physical appearance, he didn't look as well to you?

A. No, he didn't appear well.

Q. He was worn out with watching and anxiety?

A. I suppose that was why.

Q. And in the early part of the fall of 1900 he had a sick spell?

457 A. In the fall of 1900.

Q. Did he not have another sick spell in the winter of 1900 soon after his wife's death when Mr. Laird nursed him?

A. That was in the fall of 1900.

Q. You are clear about that, are you?

A. Yes sir.

Q. Now long did he suffer from that sickness as it seemed to you?

A. I don't remember just exactly; I don't think it exceeded four or five days, or possibly a week that he was confined to his bed.

Q. From the time of his wife's death until that sickness, what was his condition?

A. Well, his condition was hardly normal after his wife's death until that sickness.

Q. And he was confined to the house for some days at that time?

A. At the time of his sickness, yes sir.

Q. And then was convalescent for a time afterwards?

A. Yes sir.

Q. And it took considerable time for him to recover from that?

A. I don't think he was confined to the house more than ten days or two weeks, I am not positive.

Q. And that confinement showed upon him for a while afterwards?

A. Yes sir; for a few weeks.

Q. And then you think he began to mend?

A. I think after his wife's sickness and death that that spell in 1900 was the turning point in his health and he regained his normal condition, and about 1902 he was stronger than I had known him since his wife's serious sickness.

Q. In speaking of serious sickness you are speaking of her last sickness?

A. Yes sir; her last sickness.

458 Mr. SMART, was next called as a witness on behalf of plaintiffs, and being duly sworn testified as follows:

Direct examination by Mr. RANDOLPH:

Q. You names is Samuel A. Smart?

A. Yes sir.

Q. What work are you engaged in?

A. I am in the ministry.
Q. What church.
A. Methodist.
Q. How long have you been in the ministry?
A. Bout 18 years.
Q. Where do you live?
A. I live near Maysville now.
Q. Did you live at Weatherby?
A. Yes sir.
Q. How long?
A. I moved there in May 1898, and lived there until September 1899.
Q. Then where did you go?
A. I moved to a farm near Maysville.
Q. How far from Maysville, and which way.
A. Southwest, 7 miles.
Q. Did you know Eber B. Roloson?
A. Yes sir.
Q. Have you seen him frequently since you resided at Weatherby?
A. Yes sir, I saw him perhaps after leaving Weatherby as much as 4 or 5 times, the two following years, maybe oftener than that, I wouldn't say positively; then again I was stationed at Weatherby as the preacher, and was there 2 years again.
Q. What year was that you were there again?
459 A. That was in the fall of 1902, and the fall of 1904.
Q. From 1902 to 1904, in the Fall.
A. Yes sir.
Q. Now when did you first become acquainted with Eber B. Roloson?
A. I had no personal acquaintance with him until about the time he moved to Weatherby.
Q. Did you get well acquainted with him then?
A. Pretty well acquainted I thought.
Q. Were *at* you at his house sometimes?
A. Yes sir.
Q. Knew his wife?
A. Yes sir.
Q. You remember when she died?
A. I remember when she died; she died after I left there, about a month.
Q. You got acquainted with him when he came to Weatherby?
A. Yes sir.
Q. Now when you saw him in the years 1901 and 1902, what was his condition of health, as compared with your first acquainted with him?
A. I don't know that I saw any particular difference in his health.
Q. What time in 1902, was it that you went back to Weatherby?
A. In September.
Q. Did you see him, or not, from that on?
A. No, not constantly; only once a month, sometimes twice.

Q. Did you see him when you were ther-?
A. Sometimes, not always.
Q. How did he look to you that Fall, whether he was in normal condition of health?
A. I don't know that there was anything about him so that
460 I saw any real change from the first time I saw him until that time.
Q. Nothing to attract your attention?
A. No sir.
Q. Did he cough?
A. I never heard him cough that I know of; I might have but nothing to attract my attention.

Cross-examination by Mr. KERR:

Q. You didn't see very much of him after you moved away from Weatherby in 1899?
A. No sir, not in 1899. I left there in September 1899.
Q. After that you saw but very little of him?
A. For 2 years.
Q. He never was any thing more than a delicate looking man?
A. I would not call him a delicate looking man; he was a lean, spare made man.
Q. What was his color?
A. He was rather a fair complexion, as I rem-ber him.
Q. Would sallow be a proper adjective to describe his color?
A. I don't know whether I would call it sallow, or sunburn, don't know what you would call it; he was rather a fair complected man.
Q. And in September, 1902 you saw him again when you returned to Weatherby to live?
A. Yes sir—I didn't return there to live. I went there as a pastor, but didn't move there.
Q. Still remained where you had been living?
A. Yes sir.
Q. And went there once every month or so?
A. Yes sir.

461 Mrs. RIGGS, was recalled and testified further as follows:—

Redirect examination by Mr. RANDOLPH:

Q. Mrs. Riggs, I want to ask you a question: I am not sure whether I asked you or not. I want to ask you if Mr. Robson had a cough.
A. No sir.

ALEX. GROOMER, was next called as a witness on behalf of plaintiffs and being duly *sworn* testified as follows:—

Direct examination by Mr. RANDOLPH:

Q. Your name is Alex Groomer?
A. Yes sir.
Q. Where do you live.
A. De•Kalb County, near Fairport.
Q. You are a farmer?
A. Yes sir.
Q. To what extent.
A. I have 130 acres of land.
Q. How far is that from where Eber Roloson's farm lies?
A. A mile and a half.
Q. Were you acquainted with Eber B. Roloson?
A. Yes sir.
Q. How long did you know him?
A. I have been well acquainted with him ever since the fall 1882.
Q. Did you know him while he lived at Weatherby?
A. I did.
Q. Did you see him frequently?
A. About 4 or 5 times a year is my recollection.
Q. Did you see him frequently when he lived on his farm?
A. Yes sir, saw him oftener then.
Q. What sort of a looking man was he?
462 A. He was a lean, kind of spare built man I would call him.
Q. What as to his viger, and health, as compared with other men?
A. Well sir, in my judgment about an average with other men of his generaly make-up.
Q. Did you see him in 1901, the fall of 1901?
A. I don't know that I did, immediately in the fall.
Q. Did you see him during the year 1901?
A. Yes sir.
Q. How many times would you say you saw him during that year?
A. Well, probably 3 or 4 times.
Q. Did you see him during the early part of the year 1902, and during the summer?
A. Yes sir.
Q. Now at those times that you saw him, what was his condition of health?
A. Well sir, his condition of health was about normal at the time I saw him.
Q. About the same as it had been before with the exception of course of age?
A. Yes sir, he was a little older.
Q. Mr. Groomer, do you know where he fed in the fall and winter of 1902.
A. Yes sir.
Q. Do you know whether he lost any hogs or not?

A. I passed by his farm, and saw his hogs; they looked very sickly when I see'd them. Further than that I don't know only by hearsay.

Q. You don't know how many died?

A. Do not.

463 Q. Do you know how many he had in the feed lot?

A. He told me.

Q. Did you see the bunch?

A. I saw the bunch.

Q. How many would you say from looking at them were in there.

A. I would say at least 300.

Cross-examination by Mr. KERR:

Q. Mr. Groomer, did any person ever inquire of you during the life time of Eber Roloson, concerning his health?

A. Yes sir.

Q. Did that insurance company once write you, aski-g you what you thought of him as an insurance risk?

A. They did not.

Q. Did you ever state to any person——

Mr. RANDOLPH: We object to the general question. He should name the person if he wants to draw his attention to any one.

Mr. KERR: I am not yet laying the foundation of impeachment, I am cross-examining him.

The COURT: Proceed.

To which ruling of the Court, plaintiffs at the time excepted.

Q. Did you ever state to any person, during the life time of Mr. Roloson, that he was as good as a dead man, or words to that effect?

A. I did not.

Q. Did you ever state to any person that you did not see how an insurance company would ever take him for a risk, or words to that effect?

A. I did not.

464 Q. Did you during the summer of 1901, have a talk with Mr. Craig Austin Craig, about Roloson taking out insurance?

A. No sir.

Q. Or during the year 1902?

A. My recollection is that I never talked with Mr. Craig in regard to insurance.

Q. In regard to the physical condition of Eber Roloson.

A. In regard to the physical condition of Eber Roloson.

Q. Did you during the summer—do you remember having a talk with him during the year 1901, in front of your own farm house?

A. Of who?

Q. With Mr. Craig, in front of your own farm house?

A. I do not.

Q. Did you not during the summer of 1901, state to him in a conversation had with him on your farm, that an insurance company had written to you about the physical condition of Eber Roloson and

you had written back to them that he was as good a risk as any other dead man, or words to that effect?
A. I am positive that I did not.

BOB REDMOND, was next cal-ed as witness on behalf of plaintiffs, and being duly sworn testified as follows:

Direct examination by Mr. RANDOLPH:

Q. Your name is Robert Redmond?
A. Yes sir.
Q. Where do you live?
A. North west of Weatherby, De Kalb County.
Q. How far from Weatherby?
A. About 3 1/2 miles.
Q. You do a good d-al of business in Weatherby?
A. Yes sir.
465 Q. What is your business?
A. Well, I trade a good deal.
Q. Farmer, are you?
A. Yes sir.
Q. Have you a farm?
A. Yes sir.
Q. How much.
A. 380 acres.
Q. To what extent do you feed cattle?
A. I feed quite a good many cattle.
Q. Did you know Eber Roloson in his life time?
A. Yes sir.
Q. What business was he in.
A. He was a farmer, shipped stock quite a good deal.
Q. How long have you known him.
A. I have known Mr. Roloson 25 years.
Q. Ever since you were a boy?
A. Ever since I was a boy.
Q. You were raised in that neighborhood?
A. Yes sir.
Q. Did you go to school to him?
A. Yes sir.
Q. Did you know him well in the years 1901, and 1902?
A. Well, yes.
Q. What sort of a man was he when you first knew him, as to his make-up.
A. When I first knew him, as I recollect, he was a -*ps*re made man then.
Q. How did he compare, except for age, in the year 1901 and the early part of 1902, up and until the summer and fall.
466 A. Well, about the same.
Q. What would you say as to his state of health during the summer and fall of 1901, and the spring and summer of 1902?
A. Well, he was an ordinary man, he was a spare made man.

Q. Would you say his health was normal as compared with what it had ordinarily been.

A. Yes sir.

Q. Were you ever with him when he was handling stock, working?

A. Yes sir.

Q. How was he as to activity, and endurance?

A. He was always on the go, and looked after his business.

Cross-examination by Mr. KERR:

Q. He was a very nervous, energetic sort of man?

A. He had plenty of business in him.

Q. And was rather of a rather delicate type.

A. I wouldn't say he was rather of delicate type.

Q. He was small, and thin, and sallow wasn't he?

A. He was an ordinary sized man.

Q. About what weight in your opinion?

A. Well I judge Mr. Roloson would weigh any where about 135 to 145 pounds.

Q. Did his weight seem to vary, or was it constant.

A. Well, I would say it was about the same.

Q. It would run between those 2 weights during all those years?

A. Well, not between those two weights, but his weight looked like about the same all the time, I wouldn't say exact; I don't know, but looked like about that.

Q. Did he not after the death of Mrs. Roloson, appear to
467 be weaker than formerly?

A. Well, right away after the death of Mrs. Roloson, I didn't see Mr. Roloson for probably a week or two.

Q. Well, during the year following her death, he was weakly wasn't he?

A. Wel-, I couldn't say Mr. Roloson was.

Q. You think he looked as well as ever?

A. He was a spare made man, he -as not no heavy weight.

Q. Do you want the jury to understand that he was just the same during the year 1900, as during the years 1898 and 1899?

A. Well, I didn't see him right away after his wife died.

Q. You saw him during the year?

A. Yes sir.

Q. And during that whole year he was just as well as ever?

A. I think Mr. Roloson was about the same.

Q. Same condition as before?

A. About the same state.

Q. You say that of all the time after the year 1898, do you until the time of his final sickness?

A. Not all the time. In 1902 I think Mr. Roloson was really stouter than he was before.

Q. Than you ever saw him before?

A. Than he was before.

Q. You are speaking of his weight and general physical strength?

A. Well, he looked better.

Q. Than you ever saw him in your life?
A. Well, I wouldn't say as I ever saw him in my life.
Q. But you will state definitely will you, that during the year following Mrs. Rooloson's death he was as well as he ever was
468 in your opinion?
A. Well, he was about the same.
Q. He looked as well as you ever saw him?
A. He looked about the same.

Redirect examination by Mr. RANDOLPH:

Q. How old are you.
A. 35 years old.
Q. You say you did not see much of him right after his wife died?
A. No sir.
Q. You don't know whether he had a sick spell or not?
A. I heard of it, but I don't know that he had a sick spel-.

Recross-examination by Mr. KERR:

Q. How often did you see him during the year 1900?
A. Some weeks I would see him every day.
Q. Saw him frequently during the year?
A. Yes sir.
Q. And throughout the -hole year, with the exception of this week you mention?
A. I said a week or two, it might have been more.
Q. You are speaking them on the time very soon after Mrs. Roloson's death?
A. Yes sir.

LOUIS COOK, was next called as witness on behalf of plaintiffs and being duly sworn testified as follows:

Direct examination by Mr. RANDOLPH:

Q. Your name is Louis Cook?
A. W. L. Cook.
469 Q. You reside where?
A. Eight miles north of Weatherby, De Kalb County Missouri.
Q. How long have you lived up in that neighborhood?
A. 23 years there and probably 10 or 15 years 3 miles north from there in Gentry County, moved out there in 1881.
Q. You mean South Gentry County?
A. Yes, three miles from where I live now.
Q. What business are you engaged in?
A. Farming.
Q. To what extent?
A. I have 240 acres there I try to farm the best I know how.
Q. Did you know Eber B. Roloson in his lifetime?
A. Yes sir.
Q. How long did you know him?

A. Somewhere from 25 to 27 years along there.

Q. Did you continue your acquaintance with him up to the time of his death?

A. Yes sir.

Q. Did you see him in 1901 and 1902, the Summer of 1902?

A. I did.

Q. What was his condition of health in your opinion in 1901 and the Spring and Summer of 1902?

A. Well, it was different at different times. I had saw him when I didn't think he was feeling so well and then I saw him when he felt better than he had before.

Q. Take it in the Summer of 1902, what was his general appearance as to health, as to whether he was in a normal condition of health?

A. In the Summer of 1902 I considered him in as good
470 health as I had ever saw him.

Q. In your 27 years' acquaintance?

A. Yes sir, age considered and actual wear and tear on a man.

Q. Of course you know where his farm is?

A. Yes sir.

Q. And you know whether he had any hogs and cattle up there in the Fall and Winter of 1902, Fall before he died?

A. Yes sir, he generally had a good many hogs and cattle there.

Q. Do you know how many hogs and cattle he had there the Fall and Winter of that year?

Q. What year?

Q. The Fall before he died?

A. Well, I have been on the farm, the road runs right by the feed lot, have passed along, and just to look over the 40 acres the sheds and feed lots were situated on, looked to me like 400 head.

Q. Do you know whether or not any of them died?

The WITNESS: If the Court will allow me to explain myself——

The COURT: You can't tell what other people told you but you can tell *you* anything you saw with your own senses, that you know yourself.

The WITNESS I could hear them talking over the telephone line about the hogs being sick and dying, the numbers——

The COURT: That is not competent.

Q. Did you see any sick hogs?

A. Yes sir, some that looked to be sick and some dead ones.

Q. Do you know to what extent the feed lot was depleted by the death of hogs there?

471 Mr. KERR: I ask that the witness, if the Court please, be instructed to tell of his own actual knowledge, and not what other people have told him.

The COURT: I have already admonished him—you can only speak of what you know yourself.

A. Well, out of those three or four hundred hogs that looked to me to be on the farm I don't know of but about 60 or 70 going to market and they were in bad condition.

Q. You saw them when they went.
A. Saw them when they went.
Q. Did you ever hear him cough?
A. If he coughed in my presence I never noticed it.
Q. It didn't attract your attention?
A. No sir.

Cross-examination.

By Mr. KERR:

Q. You were quite an intimate friend of the Rolosons, were you not?
A. I don't know—not any more so than a good many other neighbors that live all around me.
Q. You used to exchange social visits with them, both before they went to Weatherby and afterwards?
A. Yes sir.
Q. Mrs. Cook used to visit Mrs. Roloson when she was living in Weatherby?
A. Once or twice to my knowing.
Q. Do you remember any particular occasion of a visit made by yourself and your wife to Mr. and Mrs. Roloson during Mrs. Roloson's last illness?
A. Yes sir.
472 Do you remember whether or not you saw Mr. Roloson at that time?
A. I did.
Q. In the house, or outside?
A. Outside of his house and outside of the yard, just at the edge of the street.
Q. That would be in what period of the year 1899, the early Fall?
A. It was between August and October.
Q. Now what was Mr. Roloson's condition at that time?
A. Mr. Roloson at that time looked like he was tired and worn out.
Q. He was quite feeble at that time wasn't he?
A. He looked to be tired and worn out—didn't seem to be sick, only he was exhausted.
Q. Didn't that condition remain for a long time?
A. Not to my knowledge it didn't.
Q. When did you see him after that time?
A. Probably a couple of months as well as I remember from that time until his wife died, and I think I saw him probably a month after his wife died.
Q. What was his condition then?
A. He showed that he had been sick, looked like a man that had been sick; if he'd been a man I had never saw before I would have said "There's a man that's been sick."
Q. And the occasion of this interview with him you have just mentioned you say was a month or so after Mrs. Roloson's death?
A. I would think so, yes sir.

Q. Did you see much of him during the Summer of 1900—that was the next Summer?

A. I didn't go to Weatherby as often as to other towns,
473 probably be to Weatherby once a month and would see him when I were there, and probably that often or oftener would see him passing up to his farm past my place, generally would have a talk with him as he would go up and back.

Q. What would you say of his condition during that Summer—as a matter of fact he looked like a sick man——

A. What Summer?

Q. The Summer of 1900—now that is the Summer following his wife's death.

A. Well, the following Winter after his wife's death I didn't see him very often as I said; the next Summer it appeared to me as though he got back to normal condition as the year before, would see him passing back and forth to his farm, someties on horseback, sometimes in a buggy; couldn't see but what he looked as well as he did a few years before that.

Q. And would you say that during that Summer he was as well as he had been in 1898?

A. As far as I could see he were.

Q. And that condition continued— —

The COURT: I think the witness is misunderstanding the year, from the way he answered a moment ago. The counsel is calling your attention to the Summer immediately following Mrs. Roloson's death, that is the Summer of 1900—you may answer in reply to that.

The WITNESS: She died in the Fall of 1899, it seems to me.

Q. That is correct. Now do you want to be understood as saying that during the next Summer he was as well——

A. No sir, I didn't mean to say that.

Q. Do you mean to be understood as saying that for the
474 year following his wife's death he was not well, not as well as he had been before?

A. Not as well as he had been before.

Q. Did you know of his sickness in the Fall of 1900, that is approximately a year after Mrs. Roloson's death?

A. Only circumstantially; I heard it talked over the 'phone and talked with the doctor that went to see him, going by my place, and said he was going to Eber's; he was sick.

Q. That is about a year after his wife's death, isn't it?

A. It seems like it would be 10 or 11 months; it seems to me like if she died in October then probably his sickness was about the next September as well as I would remember.

Q. What did you see of him that Winter of 1900 and 1901?

A. That would be the latter part of 1901 and the early part of 1902?

Q. No, I am speaking of the time immediately following his recovery from this sickness.

A. In 1901?

Q. In 1900. You said you knew of his sickness in the Fall of 1900?

A. Yes sir.

Q. After that what did you see of him for a year?

A. I didn't see much of Mr. Roloson that Fall after his sickness until along in the Winter, probably towards Spring.

Q. Where did you see him then?

A. Saw him passing by my place.

Q. He was quite feeble as a result of that sickness in the Fall?

A. I never saw him but once in the Fall after his sickness and that was just after he was able to get up and around, told me he was just getting up and he looked like he had been sick.

475 Q. During that Winter you didn't see much of him. Now the next Summer you did see him?

A. I did see him, yes.

Q. What time in the Summer did you begin to see much of him? Midsummer?

A. It was in the Spring; he would ride up to his farm. I think one day in May I was at his farm with him helping him to weigh up a string of cattle——

Q. This is May 1901?

A. 1902.

Q. Mrs. Roloson died in October 1899. He was sick in September or October 1900. Now then are you speaking of the next Spring after that or 18 months after that, or are you speaking of the Spring before his death?

A. Yes, the Summer before he died in the Winter was when I saw him oftener.

Q. That would be in 1902?

A. 1902 I saw more of him in the Summer of 1902 and Fall of 1902 than I did in 1901, that is, if I date it right by his death. The Summer and Fall before his death I saw more of him than before that.

Q. Then what you mean is that in the Summer preceding his death he seemed to get back to his previous condition?

A. Yes sir.

Q. And from the time Mrs. Roloson died until the Summer before he died he was not his former self?

A. He was not down.

Q. He was not in bed but hadn't gotten back to his old condition until the Summer before he died?

476 A. I can't say he hadn't; I didn't see as much of him.

Q. From what you did see of him in 1901 you didn't think he was back to his old condition?

A. Didn't think he was back to the standard where he was before and what he got back to in the Summer before he died in the winter.

Q. Didn't get back to his old standard until the Summer before he died?

A. That is what I said; the Winter before I didn't meet him much; hear him talking over the line and recognized his voice.

Redirect examination by Mr. RANDOLPH:

Q. When was it you went up and helped him weigh up the cattle?

A. It must have been in May before he died the coming Winter, May 1902 if I ain't mistaken.

Q. What part did he take in getting the cattle on the scales?

A. He stood at the beam and done the weighing. I and his hands and his brother were rustling the cattle around, and if he was needed to open a gate or punch a steer in on the scales he would rush out there and jab him on.

Q. What about his ability to work as compared with before his wife's death?

A. He was getting around in the pen, sorting cattle, about like I and the rest of the boys; he was a light man and got around quicker I believe than I did; he was light and I don't know how long it would last.

Q. It lasted while you were there, did it?

A. While the job lasted, yes sir.

477 Mr. A. B. SHELLMAN was next called as a witness in behalf of plaintiffs, and being duly sworn testified as follows:

Direct examination.

By Mr. RANDOLPH:

Q. Your name is A. B. Shellman?

A. Yes sir.

Q. You live at Weatherby?

A. Yes sir.

Q. How old are you?

A. 57.

Q. How long have you lived at Weatherby?

A. 12 or 15 years.

Q. What is your business?

A. Miller.

Q. Did you know Eber B. Roloson?

A. Yes sir.

Q. How long did you know him?

A. About five years the latter part of his life, after he moved to town.

Q. Do you remember the fact of his wife dying?

A. Yes sir.

Q. How frequently did you see him after that until his own death?

A. Sometimes see him two or three times a day and maybe wouldn't see him for several days, off and on, like one man would another in town, meet him on the street.

Q. In the Spring and Summer before he died Mr. Shellman what was his state of health as you observed it in the Spring and Summer before he died?

A. All right, so far as I know; never heard him complain or anything; always saw him around on the street.

478 Q. Did you ever hear him cough?

A. No.

Q. In the preceding Summer of 1901 how was it?

A. About the same as far as I know.

Q. Do you remember when he had the sick spell in 1900?

A. I recollect he had a sick spell of a few weeks.

Q. After he recovered from that did he get into an ordinary normal condition?

A. As far as I could see, yes, seemed to be as well as he ever was.

No cross-examination.

BENNETT RIGGS was next called as a witness in behalf of plaintiffs and being duly sworn testified as follows:

Direct examination.

By Mr. RANDOLPH:

Q. Your name is Bennett Riggs?

A. Yes sir.

Q. Where do you live?

A. Two miles and a half north west of Weatherby.

Q. How long have you lived there?

A. I have lived there continuously since 1879; I was born and raised in that country but I was out of it seven years.

Q. What is your business?

A. Farming.

Q. To what extent do you farm?

A. I handle 460 acres of land.

Q. Are you engaged in any other business—banking?

A. I have an interest in two banks, yes.

Q. You are a brother of Mr. Paul Riggs, one of the executors of Mr. Roloson's estate?

479 A. Yes sir.

Q. Did you know Eber B. Roloson?

A. Yes sir.

Q. How long did you know him?

A. Continuously since 1879, but I knew him before I was away seven years; I got acquainted with him I think when he first came to the country, I believe that was '74, but I was away from there a while before that.

Q. Did you have opportunities of seeing him and observing him after he moved to Weatherby?

A. Yes sir, saw him from once to three times a week.

Q. And do you remember after that whether or not he had a sick spell?

A. Well, not immediately after I don't think he had, but he was very much worn out after his wife's sickness, he waited on her continuously night and day.

Q. Were you at his house at times while she was sick?
A. Yes sir.
Q. When was it as you recollect it that he had that sick spell?
A. I don't remember exactly when it was, but I think it was a few months after his wife's sickness.
Q. Did he recover from that sick spell?
A. I thought he did; he looked like it.
Q. After that and on until the Fall of 1902 just preceding his death, what was his physical condition?
A. I thought it was fully normal—as good as it had been before his sickness.
Q. Now was his condition, except for age, about the same as it had been——
480 Q. During the time you had known him?
A. Yes sir.
Q. Did you ever hear him cough?
A. Never did.

No cross-examination.

An adjournment was here taken until Monday March 13, 1905.

MONDAY MORNING, *March* 13, 1905.

Morning Session.

The COURT: The answer in this case is so general that I did not, at the time that the pleadings were up think it best to require defendant to make it more specific and certain, but when we get as near to the close of the case as we are now it is the proper time for counsel for the defendant to fetch their case down to a reasonably specific issue so that the cause can be submitted to the jury intelligently. I wish to see if in reading the pleadings I have been led into any misapprehension and to that end I call the attention of the counsel to certain matters. The first is as to the averment of the answer in substance to this effect: That the only disease or ailment for which the insured had consulted a physician within ten years was a bilious attack. Should that not be one year?

Mr. KERR: I think that is correct, if the Court please. The application I believe states one year and that is a clerical error. Your Honor is speaking of an excerpt from the application and a false answer to it?

The COURT: Certainly. I do not find the specific averment in the answer, but in reading it over this morning I find an averment in the answer to be that there was a representation or warranty that he had not consulted a physician within ten years.

481 Mr. KERR: That should read one year in connection with the answer to the first count and 19 months in regard to the second count, to conform absolutely to the application, but if the Court please, there is this provision though: Give name and address of each physician who has prescribed for or attended you within the past ten years, and for what diseases and ailments, and dates.

The COURT: The second matter I had in view was this. The averment in the second part of the application in which the insured stated in substance that he had been for twelve months in good health and free from all ailments, diseases, weaknesses and infirmities. Would this include the bilious attack in the Fall of 1900. That being specifically referred to in the first must not the application be construed as an entirety?

(jury?)

Mr. KERR: If the Court please, in that connection you are to determine whether or not the answer given is full, fair and complete in connection with the evidence and the issues.

The COURT: The point I had in mind was whether he having specifically answered in part of the same document and paper that he had suffered a bilious attack in the Fall of 1900 and was attended at that time by Dr. Patton, would that bar a misrepresentation which would otherwise have arisen from his answer in this matter in the second part of the application, where he says: "Are you or have you been in good health through all the past twelve months, and free from all diseases, ailments, weaknesses and infirmities?" The answer is "Yes."

Mr. RANDOLPH: The first policy was issued in November 1901 and the bilous attack was in September 1900, which was more than a year.

482 The COURT: That is a fact. I had not thought of that.

Mr. KERR: I do not agree with counsel as to evidence concerning the date of that bilious attack.

The COURT: That will be a matter for you to look up in the evidence if there is any uncertainty about it. If there were any that said later than September it might be a question.

As to the next matter, that he had never had any illness, local disease, or mental or nervous disease, weakness, or ailments of the head, throat, lungs, heart, stomach, intestines, liver, kidneys, or blood, or any diseases or infirmity whatever—what is the meaning of the term local disease as used in that connection?

Mr. KERR: I think it refers to a minor affliction of some portion of the body as contradistinguished from a disease which affected the whole system.

The COURT: Typhoid fever would affect the whole system. A local disease, like heart disease?

"Mental or nervous disease or infirmity." Is it claimed by you that there is any evidence here of any mental or nervous disease?

Mr. KERR: It is in evidence here that he was subject to nervousness, to a palsied shaking of the head, during the year 1900 and thereafter, and that at the time and after the time of Mrs. Roloson's death he was in a nervous and depressed condition and suffering from some nervous and mental disease and disorder.

Mr. RANDOLPH: Of course an excited condition and a diseased condition are two different things. None except one or two of the witnesses they produced said when he got excited his head would shake. That is not sign of disease. It is an excited condition.

483 The COURT: The diseases I had thought were developed mainly by the evidence, as to which there is any conflict, regarding which there is substantial evidence in the case, would be bronchitis, gastritis, aen-emia and consumption. I don't remember any evidence as to any other disease.

Mr. KERR: Perhaps there is no other disease so particularly and pathologically described, but we contend, if your Honor please, that it is not necessary to produce a physician to prove that this man had any particular disorder in order that the jury may be warranted in finding that there was some ailment.

The COURT: That is another thing. We will deal with that when we get to another clause.

Mr. BROWN: The testimony is that the gastritis was, in the opinion of his doctor, secondary to nervous disease.

The COURT: Well, that was, secondary on account of the prostration he suffered from financial loss.

Mr. BROWN: No sir, the history of his gastritis was four or five years before 1900, and that in the opinion of the doctor it was secondary——

The COURT: I was not aware that there was a syllable of evidence here in this record tending to show that he had any touch of gastritis prior to 1900.

DICK SMITH was next called as a witness in behalf of plaintiffs, and being duly sworn testified as follows:

Direct examination.

By Mr. RANDOLPH:

Q. Dick Smith is your name?
A. Yes sir.
Q. Where do you reside?
484 A. De Kalb County.
Q. How far from Weatherby?
A. Three miles they call it I believe.
Q. Did you know Eber B. Roloson in his lifetime?
A. Yes, sir, I have met him?
Q. How long did you know him?
A. Why, between four and five years that I knowed him.
Q. Did you ever work for him?
A. Yes sir.
Q. Where?
A. Up there on their ranch, up there in De Kalb County on the farm.
Q. When did you work for him?
A. 1902 and 1903.
Q. You worked for him up to the time of his death then?
A. Yes sir.
Q. When did you begin working for him?
A. In the month of November.
Q. What year?
A. 1902.

Q. Do you know how many cattle Mr. Roloson fed that Fall?
A. Fed 151 head.
Q. What were they—what class of cattle?
A. They were good, heavy cattle.
Q. What age?
A. Four year old they called them.
Q. They come four years old in the Spring of 1903 you mean?
A. Yes sir.
Q. Did he have any hogs?
A. Yes sir.
485 Q. Did any of his hogs die?
A. Yes sir.
Q. How many?
A. About 294 or 296.
Q. Were you there when they died?
A. Yes, sir.
Q. What was their average weight?
A. About two hundred pounds.
Q. Did you take care of the stock?
A. Yes sir.
Q. It was your business to feed and take care of the stock?
A. Yes sir I worked in the feed lots all the time.
Q. Who worked with you?
A. A man — the name of Riggs.
Q. What was his first name?
A. Otis.
Q. What did you do with those hogs?

Objected to on the ground that it is incompetent, irrelevant and immaterial.

Objection overruled.

To which ruling of the Court defendant at the time excepted.

A. Hauled them out east of the place there and burnt them, piled them up and burnt them.
Q. When was it they died?
A. They commenced, let's see, in December and January was when they died as near as I can recollect.
Q. What year?
A. 1903.
486 Q. December 1902 you mean?
A. Yes sir, 1902.
Q. And January 1903?
A. Yes sir.
Q. How early did they begin dying—did the disease strike them?
A. The last part of December as near as I can recollect.
Q. Can you fix it by Christmas?
A. Fix which by Christmas?
Q. The time, as to whether it was before Christmas?
A. No, I don't believe I can right now.
Q. Now did they ship out the remnant of the hogs?
A. Yes sir.

Q. And it was up to the time they shipped out the remnant of the hogs?

A. Yes sir.

Q. And for a couple of months before that.

Defendant objects to questions as leading.

The COURT: Proceed with the examination, be careful not to ask leading questions.

Q. Did you see Mr. Roloson frequently during that year you worked on his farm?

A. Yes sir.

Q. What was his condition of health from the time you began up until that Fall?

A. Why it was right good.

Q. Did he ever go up there?

A. Yes sir, he come up there.

Q. How would he come?

A. Sometimes horseback, sometimes in a buggy.

487 Q. How far was it?

A. I forget whether they call it nine or ten miles.

Q. What time in the morning would he arrive?

A. Sometimes daylight, sometimes a little before daylight.

Q. What was his activity when he was around the farm, was he active or otherwise?

A. Yes sir, he was active, quick walking, take hold of anything and help, shovel corn when I was feeding, jump in and help feed sometimes, helping with the windmills when they would be out of fix.

Q. What about coming there—how often did he come?

A. Well, he come up I think once or twice a month, of course sometimes a little oftener, sometimes not so often.

Q. Did he keep in communication with you all the time?

A. Yes sir, they had a phone there and talked to him every night over the phone, and every day there, talked about the business you know.

Q. Do you remember the last time he was up there before he took sick?

A. The last time he was up there before he took sick we shipped out a carload of hogs as near as I can recollect just before he took sick.

Q. Was that what was left after they died?

A. No, no, that was the Fall before you know, that was in the Fall; picked out some of the large ones you know.

Q. Do you know what time that was in the Fall?

A. No sir, I don't. I tell you, the last time he was up there they was weighing the cattle to see what they weighed. He was up there then—I don't recollect whether he was up there after that

488 or not.

Q. He helped them weigh?

A. Yes sir.

Q. What did he do about weighing them?

A. Helped run them in and took down the weights.
Q. What was his activity and strength that day?
A. Active and quick as usual.
Q. Do you know how late in the Fall that was?
A. No I don't.
Q. What month would you say it was in? Give your best judgment.
A. That is something I couldn't really tell you.
Q. Could you say whether it was before the cold, chilly weather had set in?
A. I couldn't say the date.
Q. Perhaps we can get at it this way: When did they put the hogs in the feed lot—when did they commence feeding?
A. They put them in the feed lot, commenced feeding about the last of September or in October.
Q. Was it after that?
A. That he was up there?
Q. That you shipped this load of hogs out when you were weighing the cattle?
A. No, before this, the other bunch he cleaned out you know, only he left some on the place.
Q. Would you say it was in October or September?
A. He was up there a heap later than that, for he come up there way later than that; he come up there again right along all Winter,
489 but I couldn't say when was the last time he was up there, along a while before we shipped out the cattle, but I couldn't say when.
Q. How long was it before he got down sick that he was up there?
A. Well, I could—as near as my recollection, before he took down sick is between three or four weeks, I wouldn't be positive.
Q. Something like four weeks you think? You are not sure?
A. No sir, I am not.
Q. Did he have a cough?
A. Never heard him in my life.

Cross-examination.

By Mr. KERR:

Q. Do you know anything about his bringing some cattle down to St. Joseph about the middle of December?
Mr. RANDOLPH: It was hon—7th of December.
Q. Do you remember the last load of hogs then he brought down here?
A. In what month I don't, no sir; I don't remember what——
Q. You remember the occasion though? Apart from the absolute date you remember the last load of hogs he did bring down here?
A. No sir.
Q. Do you remember about his bringing any hogs down here that Winter at all?
A. I couldn't swear to it at all.

Q. Then you don't remember of any shipments being made that year?
A. That he shipped down to the farm?
Q. No, down here from the farm, or from Weatherby.
A. That he shipped from Weatherby? Yes sir, he shipped some from Weatherby.
Q. Where to?
490 A. I don't know myself only I heard they shipped to St. Joe.
Q. And what was it that you talked about shipping to St. Joe? Hogs?
A. He shipped a carload of hogs to St. Joe, yes sir.
Q. What time of the year was that—did you have anything to do with the shipping?
A. No sir, that was in the Fall.
Q. And that was the last shipment you know anything about?
A. Well, he shipped that carload of hogs out in the Fall.
Q. Did he ship any after that that you know of?
A. Yes sir.
Q. When?
A. He shipped out some of the remnants of them that died.
Q. When?
A. Along in the Spring, that is, a while before he shipped out the cattle.
Q. How long before he shipped out the cattle?
A. Well I couldn't say exactly how long.
Q. Do you know when he shipped out the cattle?
A. No sir, and I helped take them there too.
Q. But you can't fix the date?
A. No sir, I can't. If I had my book, I have it on my book.
Q. You don't know whether it was after Christmas or before Chritmas?
A. I know it was after Christmas.
Q. Did you see him at that time?
A. It was in February the cattle was shipped, but I——
Q. Did you see Mr. Roloson at that time?
A. Yes sir.
Q. Where?
491 A. When we brought the cattle to Weatherby I saw him. When we first started by there he was in the window.
Q. Did you see him outside of the house?
A. Yes sir, after I come right along with the cattle, I was driving part of them——
Q. Did you see him outside of the house?
A. Yes sir, I did.
Q. Did he go down to the cattle yard with you?
A. That morning?
Q. Yes.
A. Not as I recollect of.
Q. Can you state what day in February that was?
A. No sir, I can't. If I had my book here I could.

Q. But you know that was in February 1903?
A. Yes sir.
Q. Did Mr. Roloson come down to the stockyards there that day at all?
A. I didn't see him.
Q. Were you talking to him that day at all?
A. No sir, I don't think I was.
Q. Had you known him before you went to work for him in the year 1902?
A. Yes sir.
Q. How long?
A. Well, it might, of course I saw him there and just knew him you know, about a year before that.
Q. That would be about the year 1901 I suppose?
A. Yes sir, a year or two years, just knew him; of course I wasn't around him any much you know.

492 Redirect examination.

By Mr. RANDOLPH:

Q. I will ask you to tell about his being where you saw him when you brought in the cattle.
A. I was driving the cattle in front and he was sitting in the window next to the road and just as I got a little opposite by there he stepped out on the east side and was standing on the sidewalk.
Q. You mean on the doorstep?
A. Yes sir, and that was the last time I know of seeing him outside that day; we went on down to the yards with the cattle.
Q. Did you come back to his house?
A. That day?
Q. Were you at his house that day after you loaded the cattle?
A. Well now I wouldn't positive- say—yes sir, I know I was, for I was talking right there with him, and we all started out home from there.
Q. Was that the last time you ever saw him alive?
A. No sir.
Q. You saw him after that?
A. Yes sir.

OTIS RIGGS was next called as a witness in behalf of plaintiff and being duly sworn testified as follows:

Direct examination.

By Mr. RANDOLPH:

Q. Your name is Otis Riggs?
A. Yes sir.
Q. Where do you live?
A. I live at Weatherby.
Q. How long have you lived in that country?
493 A. I have been there three years.
Q. You were from Boone County originally?

A. Yes sir.
Q. Did you know Eber B. Roloson?
A. Yes sir.
Q. How long did you know him before he died?
A. Oh two years I suppose, about that long.
Q. Did you work for him?
A. Yes sir.
Q. Where did you work?
A. Worked on the farm.
Q. When was it you worked there?
A. I commenced working for him I think it was in December 1901. I worked there the two last days in the year, on Monday I commenced working for him.
Q. How long did you stay there then?
A. I stayed there until in February I think the next year, I think it was in February I left there.
Q. February the next year or the February he died?
A. I worked there for him 13 months.
Q. And began the next to the last day of the year 1901?
A. Yes sir.
Q. So that would carry you up into 1903?
A. Yes sir.
Q. Were you working in the feed lot?
A. Once in a while I would help around there—I was hauling in feed.
Q. You were doing general——?
A. Teaming and farm work.
494 Q. That Fall of 1902 do you remember how many cattle he fed, the Fall before he died?
A. He fed 104 I think it was, 100 head, something about that. I don't remember just how many.
Q. I am speaking of the Fall before he died?
A. Oh, the Fall—he had 150 some odd head.
Q. Do you know how many hogs he had there?
A. Right around three hundred head, somewhere about that.
Q. I am speaking of this same Fall when he fed the 150 odd head of cattle—you didn't have much to do with the feed lot?
A. No, I was just working on the farm.
Q. Did any of those hogs die that Fall, 1902, the Fall before Mr. Roloson died?
A. No sir, I don't think they did.
Q. The Fall before he died I am talking about.
A. No.
Q. The time he was feeding this 150 head of cattle—did you ever know any hogs to die on the place there?
A. Yes sir.
Q. When did they die?
A. They died there the Fall that he died, the same year.
Q. The Fall before he died?
A. Yes sir.
Q. About how many died there?

A. Somewhere in the neighborhood of 300, about that.
Q. Did you help dispose of them in any way?
A. Yes sir.
Q. What did they do with them?
A. Hauled them off on the farm and burnt them.
495 Q. Who worked with you at that?
A. Dick Smith.
Q. The man who was just on the witness stand?
A. Yes sir.
Q. Did Mr. Roloson come to the farm during the time you worked there?
A. Yes sir, he would come out there occasionally.
Q. Was he there during that Summer and Fall at any time?
A. Yes sir he was there.
Q. What did he do when he was there?
A. I couldn't say what he done, I wasn't around, he was mostly around the feed lot with his other hired hands.
Q. You could not say what he did?
A. No sir.
Q. How did he look as to health?
A. Looked to be as healthy as anybody.
Q. Did he move around?
A. Yes sir, he would go around over the place same as anybody else.
Q. Was he active or otherwise?
A. Yes sir.
Q. Do you know how he would come up there?
A. Sometimes horseback, sometimes come in his buggy.
Q. What time would he usually get there when he would come?
A. Sometimes get there pretty early in the morning.
Q. Do you remember of any time when he came there and ate breakfast with you?
A. Yes sir, I remember him coming and eating breakfast
496 there one morning, but I don't know just what time in the year it was.
Q. Did you ever hear him cough?
A. Nothing to speak of.
Q. Mr. Riggs, what in your judgment would those hogs that died have averaged in weight?
A. Averaged right around 200 pounds, somewhere about that.

Cross-examination.

By Mr. KERR:

Q. Mr. Riggs, do you want the jury to understand you that Mr. Roloson was a vigorous, healthy man?
A. He was a man about as good health as ordinary men.
Q. That is the way you would describe him, strong, vigorous, healthy man?
A. He wasn't as strong as some men of course, but he was a man that would get around and do considerable work.

Q. What was the color of his skin would you say?
A. He was a kind of tan, sort of like a man that had been out in the wind and air.
Q. Wasn't pale at all?
A. Why no, he wasn't.
Q. Nor sallow?
A. No, not to say pale.
Q. He had what you would call a good complexion?
A. Medium fair.
Q. He was about how big?
A. I don't know what he would weigh, about five feet six or eight inches tall, something like that.
Q. You say he weighed how much?
A. Oh I don't know, 140 or 50, something like that.

Q. Did his health remain the same all the time you were
497 with him or did he keep getting stronger?

A. He was about the same as well as I remember.
Q. Did you hear the testimony of Mr. Rhoades, George Rhoades, the lumber man of Weatherby—did you hear his testimony?
A. No I didn't.
Q. You would say that his health was constant during the 13 months you worked for him?
A. Up till just before I quit work for him.
Q. When did you quit working for him?
A. I quit working there in February.
Q. 1903?
A. Yes sir, he was sick in bed.
Q. And up to how long before that you say his health remained constant?
A. I don't know just hardly.
Q. Until after Christmas?
A. About that.
Q. Until that time he was as vigorous as he had ever been?
A. Yes sir.
Q. And was not failing in flesh?
A. I don't know about his flesh. I never paid much attention to him; never seen him very often.
Q. How often would you see him?
A. Once or twice a month.
Q. How often would you say you saw him in November 1902, the last Fall you worked for him?
A. I would not say, for I don't know exactly how often I did see him.

Q. Are you any relation to Paul Riggs?
498 A. I'm a cousin of Paul Riggs, yes sir.

Redirect examination.

By Mr. RANDOLPH:

Q. You said you were hauling feed, I understood you to say?
A. Yes sir.

Q. What did they feed those cattle?
A. Corn and cotton seed meal.
Q. Where did they get the cotton seed meal?

Objected to by defendant as incompetent, irrelevant and immaterial.

The COURT: I don't see its relevancy.

Mr. RANDOLPH: These items all go to show what his loss amounted to.

The COURT: You can show the condition of the cattle.

Mr. RANDOLPH: It is a question of what they cost and sold for and what feed was put into them to show what the loss amounted to, the cost of the cattle and the cost of feeding them to the time of sale, and then what they brought—one deducted from the other would show the profit or loss.

The COURT: I guess there is no serious objection to it. You may answer.

To which ruling of the Court defendant at the time excepted.

A. Hauled part of it from Santa Rosa and part of it from Weatherby.
Q. How did the corn come, on the cars?
A. On the cars, what I helped haul.
Q. The cotton seed meal was shipped in?
A. It was shipped in yes sir.
Q. Did you haul out any stock food?
A. Yes, sir, hauled out some stock food.
499 Q. Do you know how much?
A. No sir, I don't.
Q. Did you come in with the cattle the day they were brought in?
A. No sir, not the last bunch he sold I didn't.
Q. I wanted to know whether or not you had seen Mr. Roloson as you came by with the cattle but you say you didn't come in with them?
A. No sir, didn't come in with them.

CLARK PACKARD was next called as a witness in behalf of plaintiffs and being duly sworn testified as follows:

Direct examination.

By Mr. RANDOLPH:

Q. Where do you live Mr. Packard?
A. Weatherby.
Q. How long have you lived there?
A. Since the 1st day of January 1901.
Q. Where did you live prior to that?
A. Cameron.
Q. Were you raised there?
A. Yes sir, born and raised there.
Q. What business are you in?

A. Cashier of the Bank of Weatherby.
Q. Have you been cashier ever since you moved up there?
A. Yes sir.
Q. Did you know Eber B. Roloson in his lifetime?
A. Yes sir.
Q. How long did you know Mr. Roloson?
A. I think he was about one of the first men I met when I went to Weatherby.
500 Q. What was your acquaintance with him from then on until his death?
A. I think that I met him nearly every day, especially if he was in town.
Q. What was the condition of his health so far as you observed Mr. Packard?
A. Why there wasn't any perceptible change in him that I could notice. If anything it seemed to me he carried a little more flesh the last Summer there than he did when I first went there.
Q. Now what would you say as to his being in good health or otherwise during the time you knew him?
A. There was nothing that attracted my attention in any way that would indicate any bad health.
Q. About what size man was he?
A. I would take him to be about five foot and seven to nine inches in height.
Q. And what would you say as to his weight?
A. He would probably weigh from 135 to 40, or maybe a little heavier.
Q. Did Mr. Roloson, the Fall before he died, when he was feeding, buy and cotton seed meal to feed his cattle through your bank?
A. Yes sir, he paid for it through our bank.
Q. Can you tell the jury about how much he paid out for it?

Mr. Kerr: We object to that as incompetent, irrelevant and immaterial.

The Court: I can see how the value of the cattle might receive a different aspect in this case from what it would in an ordinary law suit. The question here is the extent of the loss which Mr. Roloson suffered, it being contended by the plaintiffs in this case that
501 he was overwhelmed by financial disaster, and that this cattle venture was a part of it. Of course in a suit as to the value of the cattle what they cost him would be quite immaterial, but however, in measuring the extent of the financial disaster he suffered, the way then to get at it would be what he put into the cattle and what he got out of them. Whether it was a foolish venture is quite immaterial; the extent of his financial loss is what we are concerned in.

Mr. Kerr: I think I shall withdraw my objection.

A. I think he probably got in from 7 to 8 carloads of cotton seed meal.
Q. Do you know what it amounted to?

A. They averaged probably, the meal and the freight would average probably a little less than $500.00 to the car.

Q. How many cars would you say there were?

A. In the neighborhood of 7 or 8 in my best recollection.

Q. Now Mr. Packard, did you go to Chicago with his cattle when they were shipped?

A. Yes sir.

Q. Did you go as Mr. Roloson's representative?

A. Yes, I went along with them, I presume you would call it as representative.

Q. Do you know how many cattle were shipped by Mr. Eber B. Roloson at that time?

A. Why, I think around 150 head.

Q. Can you tell without referring to any memorandum to refresh your memory as to what they brought net, after freight and yardage was taken out?

502 A. In dollars and cents, total amount?

Q. Yes sir.

A. I think it was something over nine thousand dollars, if I remember.

Q. I will ask you to look at this paper and tell what that is.

A. That is a bill of the commission firm that he shipped to of the sale of the cattle.

Q. Did they have a representative at Weatherby to see about the shipment?

A. Yes sir.

Q. He went with you as you went up?

A. Yes, he went up with us.

Q. State whether or not that is the returns on the cattle?

Mr. KERR: Objected to as incompetent, irrelevant and immaterial and not the best evidence.

The COURT: Objection sustained.

Q. Did the money go through your bank?

A. Not this money.

Q. Do you refresh your mind from that paper so as to state what the cattle brought?

Mr. KERR: We object to the witness refreshing his mind or attempting to refresh his mind from a memorandum made by somebody else.

The COURT: Objection overruled.

To which ruling of the Court defendant at the time excepted.

Q. Can you by refreshing your memory with that paper state what the cattle brought net.

Mr. BROWN: If the Court please, he is not entitled to state by refreshing his memory from the paper unless he knew the
503 fact himself at one time; it is his memory he refreshes, and not his knowledge, and there has been no evidence that he knew how much the cattle brought—he saw them sold but the money did not go through his bank.

The COURT: If you desire to make an objection along those lines——

Mr. BROWN: We object to the question on the grounds stated.

The COURT: At the time the cattle were sold did you yourself know how much they brought?

The WITNESS: Not to the dollars and cents, not right down to the dollars and cents I couldn't state positiely.

The COURT: Were you present—did you participate in the sale?

The WITNESS: I was in the yards at the time they were sold and in the commission company's office——

The COURT: Did you hear the negotiations of the sale?

The WITNESS: Yes sir, heard the price; I know the price they brought per hundred, but just down to the amount and to the dollars and cents I couldn't state positively outside of what this shows.

The COURT: You did know approximately what they brought?

The WITNESS: Yes sir, I could have told probably for some time nearly to the dollar, but that has been two years ago and I couldn't state to the dollar; my business is in handling amounts by hundreds of transactions every day.

The COURT: I understand that, but at the time you could have stated within a dollar of what they brought?

The WITNESS: I think I could within a dollar or two of what they brought.

504 The COURT: Can you by refreshing your memory from examining the document you have in your hands state within a dollar as to what they brought, not what the memorandum shows, but from your memory?

The WITNESS: Well, from my memory——

The COURT: As refreshed by the document or anything else you have a mind to look at?

The WITNESS: I would say they brought——

Mr. KERR: Does your Honor intend to ask for what they did bring?

The COURT: Yes, if he says he knew at the time he may state within a dollar at the time.

Mr. KERR: We object to the question if it calls for the answers in dollars and cents.

The COURT: State your objection.

Mr. KERR: We object on the ground that it is incompetent, irrelevant and immaterial, because no foundation has been laid for the use of the memorandum shown the witness and it appears to have been made by some one else and not to contain any information within his own knowledge, and we except to the ruling of the Court.

The COURT: The objection is overruled. You may answer from your own memory.

To which ruling of the Court defendant at the time excepted.

A. As I said in the first answer I said it would amount to a little over nine thousand, and from the refreshing of this I say that it is, as my memory serves me, right close to $9100.00.

Q. When did you first see that memorandum you have?

A. The first time?

Q. Yes.

505 A. I have seen it a number of times. I think I saw that perhaps on the way home from Chicago and I think I saw it in the office after they made it out.

Q. At the time you first saw it state whether or not you knew it was correct.

A. Yes sir.

Mr. KERR: We object to that as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

To which ruling of the Court defendant at the time excepted.

Q. You state you knew it was correct as showing the correct amount as you saw it on the way home. You may state what amount it shows.

A. This bill.

Q. Yes sir.

Objected to as irrelevant, incompetent and immaterial.

The COURT: The objection is sustained. He cannot state what the memorandum shows.

Mr. RANDOLPH: I think the rule is if he knows it was correct when he first saw it.

The COURT: He may state what the amount is. The memocandum might be admissible in evidence on that ground.

Q. What is that paper you hold in your hand?

A. The bill of sale from the——

Objected to by defendant on the ground that the paper is the best evidence of what it is and speaks for itself. It has not yet been identified in any way or offered in evidence.

The COURT: Objection overruled.

To which ruling of the Court defendant at the time excepted.

506 A. This is a bill of sale of the cattle showing the number of head——

The COURT: You need not state what it shows.

Q. Is that the original bill?

A. Yes sir, the original bill.

Q. Now Mr. Packard, after refreshing your memory from that bill can you state what cattle brought net?

A. Of course I have seen what them cattle did bring so far as that is concerned——

The COURT: You state at the time the sale was made or about that time you saw that bill and at that time you knew it to correctly state the price the cattle did bring?

The WITNESS: Yes sir.

Q. If you are able, from refreshing your memory from an examination of the bill to state what the cattle brought you may do so, you can look at the bill to refreh your memory.

Mr. KERR: I desire to object to that on the grounds that it is

incompetent, irrelevant and immaterial, on the ground that no foundation has been laid, and I desire to except to the ruling of the Court.

The COURT: Very well.

A. They brought net $9073 and a few cents.
Q. Did Mr. Roloson have a cough?
A. Not that ever brought it to my attention that I remember.

Cross-examination.

By Mr. KERR:

Q. You are and were during the time you have referred to cashier of the bank of which Mr. Paul Riggs is president?
A. Yes sir.
Q. And what is the relation of Mr. Eugene Dehart to this transaction.
507 The COURT: You mean the sale of the cattle.
A. None that I know of.
Q. Have you refreshed your memory by examination of that paper—do you still adhere to your answer that Mr. De Hart had no connection with that transaction?
A. He went with the cattle, and he had a load of cattle on the same train.
Q. And that is all he had to do with that bill of the sale of that bunch of stock?
A. Yes sir, that is all he had to do with this bunch of stock.
Q. Why is it that it is put "On account of De Hart" or do you know?
A. Well, I don't know as I know positively, I think I know but I can't say positively.
Q. The number of cattle was 151 according to your nearest recollection was it not?
A. Yes sir.
Q. And the total price was something over $9750.00?
A. The net——
Q. I am talking about the total?
A. No sir, the total was ninety seven or eight hundred.

Redirect examination.

By Mr. RANDOLPH:

Q. The amount you stated originally was net and the amount you have just stated was gross?
A. Yes sir, before the freight and yardage and feed and everything was taken out.
Q. The memorandum Mr. Kerr called your attention to was "Terminal charges $20?"

Mr. KERR: I object to counsel reading from a memorandum not in evidence in any way, and only used to refresh the memory of the witness.

508 The COURT: He is trying to call his attention to something you spoke of as mentioned in the memorandum.

Mr. KERR: I did not mention anything except "On account of De Hart."

The COURT: The part of it you are about to read relates to De Hart?

Mr. RANDOLPH: Yes sir.

The COURT: Well.

Mr. KERR: We except to the ruling of the Court.

Mr. BROWN: The question simply was as to what Mr. De Hart——

The COURT: I understand that—if he can explain it.

To which ruling of the Court defendant at the time excepted.

Q. This De Hart entry at the bottom here, "Terminal charges $20.00" " account of De Hart," do you know anything about how that come to be there at the bottom?

Mr. BROWN: If the witness knows except from reading from the paper.

A. No sir, I couldn't really say what it is for.

Q. Does that item enter into the account at all? Is the account all footed before that item is marked there? Does that enter into the account?

A. No sir, it does not, it is all footed up before that is put on there, don't see that it is carried over at all.

Mr. KERR: We think it is incompetent for him to state what the paper shows and we move to have the answer stricken out.

The COURT: It is stricken out if it can possibly prejudice you.

Mr. BROWN: We think it does prejudice us in that way.

The COURT: Very well it is stricken out.

Mr. RANDOLPH: If the Court please I want to offer this
509 original account of the sales in evidence.

Objected to by defendant as incompetent, irrelevant and immaterial, and no foundation laid.

The COURT: The only question, if this witness knew it to be correct that would make it admissible. I don't think it does. I will sustain your objection for the present.

Mr. RANDOLPH: I offer it if the Court please for the purpose of explaining the item that Mr. Keer cross-examined Mr. Packard about for the reason that the paper itself explains the item and the jury are liable to get a wrong impression unless the paper is shown them.

Mr. BROWN: Mr. Kerr simply asked him one question as to what Mr. De Hart had to do with the shipment. If the gentlemen desire to prove what Mr. De Hart had to do with the shipment it can be proven by competent testimony.

Mr. RANDOLPH: What I want to do is read this one item to the jury and I offer to read it to the jury.

The COURT: Before the case is closed I will pass on it.

Q. Mr. Packard, have you taken the cost of the cattle, the cost of feeding them and the price they brought, and also the value of the

hogs that died and from that made a computation as to the amount of Mr. Roloson's loss?

Mr. KERR: I object to the question on the ground that it is incompetent, irrelevant and immaterial and involves assumptions of facts not proven in evidence and concerning which the witness is not shown to be qualified, because no foundation has been laid concerning the matters of inquiry.

The COURT: I don't think it is competent unless there is evidence here showing the cost of what went into the stock. Unless Mr. Packard had knowledge of the facts which went into his
510 calculation it would not be competent.

Q. Did you ascertain the cost of the cattle?

Objected to by defendant as calling for a conclusion.

The COURT: The objection is sustained.

JOHN REDMOND: was recalled and testified further as follows:

Direct examination.

By Mr. RANDOLPH:

Q. Mr. Redmond, are you a cattle feeder?

A. I feed quite a few.

Q. Can you tell the jury what would be the average cost in the Fall and Winter of 1902 up until February 8, 1903, about 130 days, of feeding a three-year-old steer, that is, three years old when put in the feed lot?

Objected to by defendant as incompetent, irrelevant and immaterial, as calling for an answer concerning facts which have not been proven and which are neither really nor presumptively before the Court nor within the knowledge of the witness, no foundation laid.

The COURT: I was of the opinion that there was evidence here as to when they began feeding the cattle; I think some of the farm hands testified to that. The average would be competent evidence if he can get the date of it.

Noon recess was here taken.

After Recess.

Mr. PACKARD was recalled and testified further as follows:

Re-redirect examination.

By Mr. RANDOLPH:

Q. Mr. Packard, can you now state what the memorandum with reference to De Hart on the bottom of this paper that I
511 showed you while on the stand refers to, do you know now what it refers to?

Mr. KERR: We object to the question for the reason that the witness has already answered in the negative, and for the further reason

that Mr. De Hart is here and ought to have personal knowledge of his own affairs and can give more satisfactory and competent evidence than a witness who has already said he could not testify as to it.

The COURT: Objection overruled.

To which ruling of the Court defendant at the time excepted.

The COURT: Answer yes or no.

A. What is it?

Q. What does it refer to?

A. Freight, freight equalization on three steers Mr. De Hart had in Mr. Roloson's car of cattle.

Q. Mr. Packard, have you any means at your hand of telling any of the amounts of money that Mr. Roloson paid out at Weatherby for corn?

A. I have the checks.

Q. The original checks?

A. The original checks he issued.

Q. Where are they?

A. There on the desk.

Q. Will you get them please.—Have you taken the checks that were for feed and listed them so you can get at a result.

Defendant objects for the reason that it does not appear that this witness has any knowledge of the purpose for which the checks were used or the purpose for which the money was paid, and it assumes a state of facts not shown to exist.

The COURT: The objection is overruled for the present.

512 You may answer the question.

To which ruling of the Court defendant at the time excepted.

The COURT: Answer yes or no.

A. Yes sir.

Q. Now during what period were those checks drawn?

A. They date from August to about the date of his death, just before the date of his death.

Q. August up to pretty near the date of his death?

A. Yes.

Q. What year?

A. August 1902 to February, the last one is February 27.

Q. That is the day before he died. Now these cattle were shipped on the 9th day of February were they not?

A. To the best of my recollection about that time.

Q. Now are the checks you speak of the checks that represented the volume of his business in the bank at that time, or just the checks for feed?

A. Just the checks for feed as near as I can ascertain.

Mr. KERR: I ask that the last answer we stricken out until I have a chance to object. I desire to interpose the objection that it is incompetent, irrelevant and immaterial; no foundation laid.

The COURT: The objection is overruled. I don't see that there is anything that has hurt you yet.

To which ruling of the Court defendant at the time excepted.

Q. What is the amount of those checks.

Mr. KERR: I desire to renew the objection I formerly made as to incompetency, irrelevancy and immateriality, no foundation laid, nor any qualification of this witness which enables him to answer, that the information called for is indefinite, and uncertain,
513 and not within the knowledge of the witness, and because it assumes a state of facts not shown by the evidence.

The COURT: Sustained. There has been no evidence adduced yet to show that the witness knows that these checks were drawn for feed that was consumed in feeding the cattle and hogs in question.

Mr. RANDOLPH: We can show it was consumed by others. I suppose we can't show all by one witness.

The COURT: If you will make the statement to the Court that you will show that all the feed for which these checks were drawn was used in feeding these cattle and hogs then I think it will be admissible.

Mr. RANDOLPH: We expect to prove that.

Mr. KERR: I don't doubt the good faith of counsel but I do doubt his capacity to prove all he expects to prove, and I would ask the Court that this evidence be excluded until he has shown the other fact, covering as it does a period of from August 1902 to February 1903, and the evidence up to the present time being so very vague and uncertain.

Mr. RANDOLPH: The Court will remember that we have already shown by Mr. Smith that the feed was hauled from Weatherby, the corn and the cotton seed meal and a ton of stock food.

The COURT: Yes, I remember he testified that some corn and some cotton seed meal was hauled, but it seems to me it is going too far to allow proof as to all the cotton seed and corn he bought to go in, until you have shown closer connection.

Mr. RANDOLPH: There is no evidence of any other use but to feed these 151 cattle and these hogs.

The COURT: There is no evidence here yet that he did not
514 have a thousand head of cattle somewhere else that he was feeding. The objection is sustained. You will have to lay your foundation before you put those in.

Q. Do you know what those checks were for Mr. Packard?

Mr. KERR: I ask that he be instructed to answer yes or no.

The COURT: You may answer yes or no to that.

A. No, not all of them.

Q. What part of them do you know what they were for?

A. These drafts that had bills of lading attached for cotton seed meal.

Q. You know what they were for?

A. Yes sir.

Q. Do you know who hauled that cotton seed meal?

A. No I couldn't say just who hauled it.

Q. Did you see it hauled away?

A. I saw the teams, yes, hauling it, Mr. Roloson's teams.
Q. Do you know of any other farm or any other bunch of cattle that Mr. Roloson had?
A. No sir.
Q. You would have known of it if he had had another bunch of cattle or another farm?

Mr. KERR: We object to that as calling for a conclusion of the witness.
The COURT: You may answer.
To which ruling of the Court defendant at the time excepted.

A. I certainly think I would.
Q. Did he have any other farm?
A. No sir.
Q. Did he have any other bunch of cattle?
515 A. No sir.
Q. Now those that have not the bills of lading attached were they given to local parties or to parties out a distance, those checks?
A. Local parties.
Q. You only know in a general way as to some of those checks as to what they were for?
A. Yes sir.
Q. Did you compute the weights on those checks at any time?
A. No sir.
Q. Were the checks drawn at the bank or were they brought in by the parties who presented them for payment?
A. Brought in by the parties.
Q. Do you know whether or not those parties were hauling corn for Mr. Roloson?
A. Not to my certain knowledge.
Q. Now those checks with the bills of lading attached, have you a list of them so you could tell the total of those? How much do those with the bills of lading attached amount to?
A. $4734.87.
Q. Now were they all for cotton seed meal or were there some carloads of corn?
A. They were all for cotton seed meal with the exception of there is a $544.20 draft included in that that was not for feed, it was for hogs that he bought on the market and shipped out there; of course the bill of lading was not attached to that.
The COURT: And the total was——
The WITNESS: $4734.87 including that.
The COURT: That was for cotton seed meal?
516 The WITNESS: Yes, sir, and that one carload of hogs, and also the freight on the cars, checks for the freight on the cars.
Q. Now what would be the balance after taking out the carload of hogs Mr. Packard?
A. It would be $4190.77.
Q. Do you know anything about whether or not Mr. Roloson bought his cattle in St. Joseph?

Mr. KERR: Of your own knowledge.
A. Yes sir, they were billed from there.
Q. Were they paid for, or in part, through your bank?
A. No sir, with the exception of this carload of hogs.
Q. I am speaking of the cattle?
A. No, not the cattle.
Q. Do you know where he got them?
A. The cattle?
Q. Yes.
A. Why he got them in St. Joe.

Recross examination.

By Mr. KERR:

Q. You answered this morning Mr. Packard that you did not know what this referred to, Mr. De Hart account—who told you since you went off the stand this morning to enable you to answer this afternoon—did you have a talk with Mr. De Hart?
A. No one told me.
Q. Did you talk with any person about it?
A. If I understood the question this morning it was stated different than that. I think it stated the terminal charges. I didn't know of any terminal charges.

Q. I asked you this morning if you knew what that re-
517 ferred to, and handed you the paper, and you answered that you did not.

A. I didn't in reference to terminal charges on account of Mr. De Hart, I did not.
Q. But since that time you have learned it was through some steers?
A. Not as to terminal charges on account of Mr. De Hart.
Q. The Mr. De Hart who is referred to here is the one sitting by the side of Mr. Randolph—one of the plaintiffs in this case?
A. Yes sir.
Q. These are the checks from which you have made the computation. Where are the drafts with the bills of lading attached which you have added—are they in order here?
A. Yes sir, the checks for the freight attached, some of them; some of them I failed to find the checks for the freight; which would amount to a little more if I had them.
Q. The checks attached to the several drafts, the ones which you counted—and these are the only ones which were included in the computation you did make?
A. Yes sir.

Mr. REDMOND was again recalled and testified further as follows:

Direct examination.

By Mr. RANDOLPH:

Mr. RANDOLPH: Please read the question I asked him before.

Qestion read, as follows:

Q. Can you tell the jury what would be the average cost in the Fall and Winter of 1902 up until February 8, 1903, about 130 days, of feeding a three year old steer, that is, three years old when put in the feed lot?

Mr. KERR: We renew our objection.

518 The COURT: I don't see that you are any further along than you were before. It seems to me there should be evidence here showing how long the cattle were fed, when they were bought and when he commenced to feed hem, if you are going to put in this kind of evidence, whether he fed them two or four months the cost would be entirely different, and the evidence as to how long he had been feeding the cattle is entirely indefinite. The objection is sustained.

Q. Did you see these cattle when they were shipped?

A. You mean when they was shipped out?

Q. Yes.

A. I saw them on the Sunday before, before they were to load.

Q. Were they finished cattle at that time?

A. Yes sir, pretty good string of cattle.

Q. Now how long, if those cattle were purchased as stockers on the market at St. Joseph, how long would it take to feed them to the state of perfection in which they were at the time you saw them?

Objected to by defendant as incompetent, irrelevant and immaterial, and as assuming a state of facts not shown by the evidence, and no foundation laid, and because there is no evidence of the place of purchase or time of purchase or the surrounding conditions of the purchase of the animals.

The COURT: Altogether too speculative.

Q. Do you know when they were bought?

Mr. KERR: Of your own knowledge Mr. Redmond.

The COURT: Proceed and answer the question.

A. A part of the cattle——

Mr. KERR: I ask that the quesetion be answered yes or no.

519 The COURT: Do you know when the cattle were bought?

The WITNESS: Well, a part of them naturally wasn't all bought, put in, the same day; I know when some of them come in, but I couldn't quite make the date.

The COURT: Proceed with your next question.

Q. Tell as near as you can the date when they came in?

Objected to by defendant as incompetent, irrelevant and immaterial, too indefinite for the purpose of proving the facts which plaintiffs' counsel is attempting to prove.

The COURT: Objection overruled.

To which ruling of the Court defendant at the time excepted.

A. As near as I can when this bunch that I saw?
Q. Yes.
A. Well, it was in the month of September I believe; I wouldn't make a certain date.
Q. Can you fix it with reference to any purchases you made yourself?
A. I put in a bunch of cattle the 29th day of September and I know this was before I bought, because I put in my cattle and I thought of his cattle.
Q. How many were in that bunch as near as you can tell?
A. Well, it was two carloads I think, but for the number I don't think I could remember.
Q. Approximate it as near as you can.

Objected to by defendant as too indefinite.
The COURT: Objection overruled.
To which ruling of the Court defendant at the time excepted.

A. Well now, you know sometimes we put in a good many more than we do other times. These were good heavy cattle——
520 Q. Cattle of that size is what I mean.
A. There was probably I think it was two loads; I wouldn't be so sure about this bunch of cattle, how many there was; I think it was two loads, more than one load I am sure.
Q. Now those steers you saw those were three-year-old steers were they?
A. They looked to be.
Q. Those steers that you saw, if they were fed until the 9th day of February, what would be the average cost of feeding each steer?

Mr. KERR: I desire to renew my objection which I made to the same question some time ago, and add to that that it is too speculative and uncertain in its nature.
The COURT: The objection is sustained on the ground that no proper foundation has been laid, not having been shown qualified to speak on the subject.

Q. How long have you been feeding cattle?
A. About 12 years.
Q. To what extent do you feed cattle?
A. Well, something like three or four hundred a year I guess.
Q. Do you raise the grain and stuff that is fed them?
A. I buy the bigger part of it.
Q. Are you able to estimate the average cost of feeding a steer when you know the price of the feed per bushel or per 100 pounds that is fed them?
A. I know about what a steer will eat.
Mr. RANDOLPH: Is that sufficient foundation?
The COURT: You were familiar with the cost of feeding stock in 1902, Fall and Winter——
521 The WITNESS: I should think I would be, yes.
Q. How many did you feed that Fall?

A. I had something like 100 in.

Q. Can you answer the question I asked you as to the average cost of feeding one of these steers that you saw up until the time that you say they were shipped, February 9, 1903?

Mr. KERR: I desire to object on the grounds before stated, and on the further ground that it does not appear that the witness has the knowedge of the facts, or that the facts are stated which would enable him to testify definitely and satisfactorily concerning the subject matter of the question.

A. That would depend on the feed, possibly, the kind of feed. I never had very much experience with this cotton seed meal, stock food, such as that. I fed hay and corn.

The COURT: The objection is sustained.

Q. Have you had any experience with cotton seed meal?

A. Just fed one carload.

Q. So that you would not know, if there was a certain proportion of each fed to a steer, whether it would be more or less expensive than feeding corn, and the Acme Stock Food?

A. I believe it would be more expensive.

Q. Would you say now that what experience you have had in feeding cotton seed meal that you could state what would be the average cost of feeding one of those steers from the time they were taken to the farm until they were shipped.

Mr. KERR: I object to the question on the grounds as before stated, and particularly because the witness has by his own testimony disqualified himself from answering.

The COURT: The objection is sustained.

522 Q. About how many steers would be in one of those cars?

A. There would be anywhere from 20 to 25.

Q. About what weight were those steers?

A. Looked to me like between 11 and 12 hundred.

The COURT: That is when they were bought?

The WITNESS: Yes sir.

Cross-examination by Mr. KERR:

Q. They varied, did they not.

—. ——.

Mr. BAKER was next called as a witness in behalf of plaintiffs and being duly sworn testified as follows:

Direct examination by Mr. RANDOLPH:

Q. Give your name.

A. Joe Baker.

Q. Where do you live?

A. I live on Missouri Avenue in St. Joe.

Q. How long have you lived in St. Joseph?

A. I have been here about seven years.

Q. Where did you live before that?

A. Gentry Counyt, Darlington.
Q. What were you doing up there?
A. Speculating in stock.
Q. What are you doing now?
A. Speculating.
Q. In stock—live stock you mean.
A. Yes sir, cattle mostly.
Q. Did you know Eber B. Roloson during his lifetime?
A. Yes sir I knew him.
523 Q. How long were you acquainted with Mr. Roloson?
A. I got acquainted with him in about '80 or '81, I wouldn't be right sure which, at McFall. I rode a good deal of the county and he and I often met.
Q. Did you do business with him at any time, have business transactions with him at any time?
A. Not at that time. He was buying for himself and a party and I were buying for myself and we didn't trade a great deal at that time.
Q. Rivals in business at that time were you?
A. Yes sir.
Q. What were his physical characteristics, as to activity, what about that?
A. He was a spare built man, about ordinary.
Q. How was he as to activity and endurance?
A. He got around. I never seen him fail to do his part of anything that was doing.
Q. After you came to St. Joseph did you see him frequently?
A. Yes sir.
Q. Did he ever stop at your house?
A. Often.
Q. Stay over night with you?
A. Yes sir.
Q. Did he eat at your table?
A. Yes sir.
Q. Up until how late did he do that?
A. Well, it must have been the last of August 1902, and maybe up as late as the middle of October; might have been later, but this is something I haven't thought of, but I know it was that late.
524 Q. Where did he usually stop when he came to St. Joseph?
A. Usually stopped with me.
Q. What was the condition of his health during that Summer?
A. Well, he was there and he and I were buying some cattle for him; I never noticed no material change unless the natural decay of the man from the time I first met him.
Q. Natural change of age?
A. Yes sir.
Q. Did he have a cough?
A. None that I know of; don't remember of him having a cough.
Q. Were you with him when he bought cattle that Fall?
A. Yes sir, I usually bought the cattle for him.
Q. Do you remember how many he bought?

A. Now its pretty hard for me to distinguish the difference. Howard bought several and he bought several but its pretty hard for me to just tell the number that either one got, but it appears like somewheres near 160 head.

Q. And Howard got pretty near as many?

A. Yes sir, close to as many. I don't just remember the number.

Q. What price cattle were they?

A. Well, I think I run from 4.40 to 4.80 in that.

Q. You mean $4.80 a hundred pounds?

A. 4.40 to 4.80.

Q. You mean per hundred pounds?

A. Yes sir.

Q. Now can you fix the date or about the date when he got these cattle?

A. I looked up what he bought from Mr. Davis I think it was along in September. I just disremember the date though.

525 Q. Davis, McDonald and Davis?

A. Yes.

Q. Was that the last bunch he bought?

A. No, I think that was along towards the first ones he bought; they declined a little in price later.

Q. Now here are two bills, see if they refresh your memory as to the number of cattle and the date of purchase?

Mr. KERR: If the Court please I object to data of that nature being shown the witness, it not being even suggested that it is in his own handwriting or that he has ever seen them before.

The COURT: It is not necessary that it should be in his handwriting.

Mr. KERR: Or that he has ever seen them before—memoranda made by others, surely cannot so use it, to refresh his memory, unless it was something with which it was acquainted at the time it was made.

The COURT: You can lay the paper before him and ask him if he was familiar with it at the time it was made. The objection is overruled.

Mr. KERR: I ask leave to cross-examine before the witness refreshes his memory as to whether he has ever seen them before or not.

The COURT: I think the counsel who offers the evidence is entitled to examine him as to whether he knows, as to whether he saw those papers at the time of the transaction, familiar with their contents, if he desires to do so.

Q. Have you seen those statements before?

A. Yes sir.

Q. Do you know whether the facts stated in them are true?

526 A. I do. I went with Mr. Roloson to all of these offices where the cattle were purchased—not in my handwrite, but in the book-keeper's—and saw all these purchases made by him.

Q. Saw all the bills?

A. Yes sir, and billed them out to him.

Q. You may state if you can tell the date when those first purchases were made by referring to that, if it refreshes your memory as to the date.

Mr. KERR: Defendant objects to the use of the memorandum by the witness on the ground that no foundation has been laid for its use by him for the purpose suggested in the question.

The COURT: Objection overruled.

To which ruling of the Court defendant at the time excepted.

A. These cattle were bought from Mr. Davis on August 26th, there is 7 head, 6910 @ 4.55; August 25, 1902, 35 head weighing 3803 @ 4.80.

Q. What date is it?

A. August 25—it is a little later than I really thought it was.

Q. Now how long after that, if you can tell, was it he bought the remaining cattle?

A. Well, we bought some from Mr. Frew after that.

Q. You mean at the same trip?

A. No, at another trip. There were two loads went out, and then he bought two loads from Mr. Frew. I could not state just the time but I think it was within eight days. Anyhow, it was along the first of October; I wouldn't know just the date. I buy cattle every day.

Q. This was August 25—now didn't he buy any in September, or did he?

527 A. In September I should have said.

Q. You say there were two loads bought that time?

A. Two loads.

Q. That would be about how many head?

A. 40 to 42 head, heavy cattle.

Q. Would make about 80; when did he purchase again?

A. We bought some from Crider but it was along there close to the same month; pretty hard to remember dates.

Q. Do you remember how many he bought of Crider?

A. Not to say exact, but over a load; I wouldn't say positively.

Q. Do you remember any one else now he bought of?

A. Pretty hard to remember now. We got several of Charlie Frew and Lafe Frew, their books were taken away, I couldn't refresh my memory by them, but we bought right along to run up to 160 head; I can't remember the dates.

Q. Can you tell about what these steers would average in weight.

A. Why they would run from ten and a half to eleven hundred somewhere, averaged in that boundary; I wouldn't know exact.

Q. Were you familiar with the cattle market during that Fall?

A. Yes sir.

Q. Kept familiar with the cattle market?

A. Every day.

Q. Did cattle rise or decline in price that Fall after he had made his purchases?

A. Cattle declined.

Q. Did they decline very much?

A. Yes, some; well now, from the middle of August to the last of September they must have declined as much as 35 or 40 cents a hundred.

528 Q. Now if those cattle were purchased at from 4.40 to 4.80 and were sold at 4.75, could there, in any method of feeding that could have been employed, have been a profit?

A. No, no; they were a loss.

Q. Now Mr. Baker, what margin of difference between the purchasing price and the selling price must there be on a steer to make a profit in an ordinary year?

Objected to by defendant as incompetent, irrelevant and immaterial, no foundation laid, not testimony applicable to the facts as they appear in this case.

The COURT: The objection is sustained, unless you embody in your question something to make it much more definite. If you were directing it to the market in Chicago that might help it to some extent—what margin must there be between the purchasing price here——

Mr. RANDOLPH: I will ask this question:

Q. Would there be any material difference in what would be realized from cattle putting them on the Chicago market or on the St. Joseph market?

Mr. KERR: We object.

The COURT: The objection is overruled.

To which ruling of the Court defendant at the time excepted.

A. There is frequently—I buy cattle on a break and run them to Chicago, and have recently, and then again it looks like they could come from Chicago this way, but in an ordinary way, taking freight, I wouldn't judge there would be a great deal of difference.

Q. When you buy on a break here and ship to Chicago you simply gamble on the rise of the market—you could sell them

529 here on the rise also?

A. Yes sir, be the same.

Q. But you gain the time, is all?

A. Yes sir; we hold them out maybe ten days——

Mr. KERR: We object and ask that the answer be stricken out. It is a suggestion of Mr. Randolph's simply, and not the answer of the witness.

The COURT: The motion is denied.

To which ruling of the Court defendant at the time excepted.

Q. Now Mr. Baker if you bought corn at 40 cents a bushel to feed steers from the time that Mr. Roloson purchased these steers until the 9th day of February of the following year, how much margin per pound or per hundred pound would there have to be *from* him to come out even on the feeding?

Objected to by defendant as incompetent, irrelevant and immaterial, no foundation laid, assuming a state of facts not shown by the evidence in this case.

The COURT: Objection overruled.

To which ruling of the Court defendant at the time excepted.

A. Well sir, I don't really believe he could have any money in it and send them out to market——

The COURT: In the Fall of 1902 we are speaking of.

A. —I am thinking of that too—I don't think he possibly, with 40 cent corn, and haul it, could have any money in it at 75 cents a hundred advance.

Q. You mean they must sell at 5.50?

A. Yes, and wouldn't be no money in it at that. We usually calculate $1.25 on the cattle to feed them, for a little profit.

Q. You mean they must sell for that to come out even?

A. To come out even. If there is any profit on it we count on $1.25.

530 Cross-examination by Mr. KERR:

Q. In order to qualify yourself to testify in this case you have been going around examining the books of these different companies from whom you made the purchases?

A. Only one.

Q. And you didn't know until you looked at their books of account what time the purchase was made nor the amount of the purchase did you?

A. I knew what the cattle cost per hundred, but couldn't remember the date, in fact I did look up the date when I saw the book.

Q. Do you mean to tell us you saw those two papers which you have had shown you made out August 1902?

A. It is just the same form Mr. Roloson should have received.

Q. Isn't that a duplicate made out to-day?

A. Duplicate no doubt, but that is the same stuff.

Q. Speaking of these two papers from which you did refresh your memory, you don't want to be understood as saying you ever saw those before—they were made out within the last couple of days?

A. I was just referring to the purchase of the cattle.

Q. You saw some other bills you think in August 1902 but not these you looked at?

A. They are duplicates.

Q. Not the ones you saw, or spoke of?

A. Certainly not, but the same copy exactly.

Mr. KERR: We now move to strike out from the record in this case the evidence given by this witness concerning the transactions involved in this memorandum which he never did see before, and also concerning the transactions mentioned in the books of account from which he refreshed his memory as he states, upon the
531 ground that they are not matters within the memory of the witness, and that he is not entitled to use what he has used to prepare for testifying in this case.

The COURT: The motion as to the dates when the cattle were purchased is granted. That is what he used the memorandum to refresh his memory from, the dates.

Mr. KERR: And the amount and the price.

The COURT: If you refreshed your memory as to the number of head.

The WITNESS: Yes, the number of the cattle, and the price. When Mr. Roloson spoke to me about the number of the cattle I told him right then what the price was on the Davis cattle, but I couldn't remember the date.

Mr. KERR: Nor the number?

The WITNESS: I remembered the two loads but sometimes they run 21 and 22 to the load—that is a pretty hard matter to remember.

The COURT: The motion is granted as to the dates.

Q. Independent of this paper can you state the date?

Mr. KERR: I object, because the witness has already stated before refreshing his memory that he could not, and since he has used an improper method of refreshing his memory and thereby is willing to say he has refreshed it, he cannot be allowed to testify.

The COURT: The motion is sustained.

Mr. RANDOLPH: It seems to me the Court must have misunderstood the witness's testimony that Mr. Kerr bases his objection on. This witness said these were exactly the same as the bills that were presented.

The COURT: You can't place a copy in his hands to re-
532 fresh his memory. If there is doubt about that you can ascertain.

Q. When did you see these papers before?

A. We went to the books——

The COURT: When did you first see these papers?

A. It was about last Tuesday or Wednesday.

The COURT: That ends it.

Q. Where did you get them?

A. At Davis McDonald and Davis'.

Q. Who made them out?

A. The book-keeper there.

Q. Independent of these papers do you recollect the dates or about the dates of the purchases?

A. Why, yes, I knew it was some time in August, but of course it was hard to remember when I am buying cattle—exactly the date.

Q. You have no independent recollection of the exact date?

A. Yes, August 25th, but tell within a day, its a pretty hard matter to remember.

Q. Outside of these papers entirely have you an independent recollection?

A. No, I have not.

Q. As to about the time?

A. I knew I purchased several cattle for them and knew the parties I purchased them of.

Q. Can you state whether or not the cattle he bought were all bought in the Fall of 1902 to be fed that Winter?

A. Yes sir, they were all for the feed lot.

DICK SMITH was recalled and testified further as follows:

Direct examination.

By Mr. RANDOLPH:

533 Q. I wish you would tell this jury as near as you can how long those cattle of Mr. Roloson's were on feed?

Defendant objects on the ground that the witness has already answered the question as far as he was capable of answering it.

The COURT: Objection overruled.

To which ruling of the Court defendant at the time excepted.

Question read.

A. Yes sir, the cattle were bought and brought up there the latter part of August and September and we commenced feeding them, I did myself.

Q. Can you tell about when in September?

A. No I could not.

Q. I meant the part of the month?

A. No I couldn't exactly.

The COURT: Could you tell whether it was near the first or near the last?

The WITNESS: I think it was nearer the middle or last of the month as near as I could tell, and I commenced feeding the cattle then, the first of October we had them on full feed and then I fed them from that on all they could eat until we shipped them out in the Spring.

Q. What did you feed them?

A. I fed them corn and cotton seed meal and Acme Stock Food and salt and hay; that was the feed.

Q. Can you tell what amount of feed was given them each day of meal and corn?

A. Yes sir, I fed them myself. I fed to the 151 head 60 bushels of corn a day and I fed them cotton seed meal every day, about from 5 to 6 pounds to the steer; then I fed that Acme Food you know.

534 Q. How much did you feed them of that?

A. I had a little cup and measured so much you know and put it in a bucket and then sprayed it around on the cotton seed meal as near as I could.

The COURT: About how much tell us so we will know something about how much.

A. During the time I fed just a trifle over a ton, and I made to feed, as the fellow said, about 12 pounds a day to the 151 head of cattle, and during the time I fed them cattle I fed a trifle over a ton of this Acme Food.

Q. How much cotton seed meal did you say you fed per steer per day?

A. Between five and six pounds.

Q. Which would you say it was closer to, 5 or 6 pounds?

A. I made to feed six pounds, but I didn't quite do it.

Q. Do you know how much cotton seed meal you fed out that Winter?
A. No sir, I don't now, I don't.
Q. How much hay did you feed a day?
A. Why, as near as I can get at it, a ton a day.
Q. You hauled that out and put in the racks every day?
A. Yes sir.
Q. What kind of hay was it?
A. Timothy hay and clover.
Q. What quality of hay?
A. The best of hay.
Q. Do you know what it was worth per ton?
A. Why no, I don't; hay was selling that year pretty high.
Q. Where did they get the hay?
A. Raised it right there on the farm.
Q. Raised all of it on the farm?
535 A. Yes sir.
Q. And you are unable to state the value of hay that Fall and Winter?
A. Yes I am, but as near as I can get at it and recollect it was five and six dollars but I wouldn't positively say.

JOHN BENNETT was recalled and testified further as follows:

Direct examination.

By Mr. RANDOLPH:

Q. You remember of Mr. Eber B. Roloson buying cattle here in the Summer and Fall of 1902 at the Stock Yards in St. Joseph?
A. Yes sir.
Q. Can you tell the jury about when it was that he purchased the cattle?
A. I couldn't swear to any positive dates; be from the first of August to the first of September somewhere.
Q. Somewhere between those two dates?
A. Yes sir.
Q. Do you know the grades of cattle he bought—did you see them?
A. Saw some of them.
Q. Do you know what they were worth at that time?
A. I saw him buy one bunch at four and a half cents a pound.
Q. How many were there in that bunch do you know?
A. About two carloads but as to the number of head I couldn't tell.
Q. Could you tell what month that was in?
A. No sir, my best recollection would be in August, but I didn't charge my memory with the date of buying and I couldn't swear positively as to any dates.
Q. About how many in a carload of those cattle?
536 A. Those were pretty good sized cattle I seen him buy that time; he could ship anywhere from 21 to 24 of them to the car. How many were loaded I don't know.

Q. Do you keep posted on the cattle market?
A. Pretty well, selling cattle every day.
Q. You are in the business?
A. Yes sir.
Q. Do you remember that Fall Mr. Bennett whether cattle rose or declined in price?
A. Cattle declined in price that Fall.
Q. Was it a material decline or otherwise?
A. Well yes, quite a material decline, I would say from a quarter to half a dollar a hundred would cover it most likely.
Q. What experience have you had in feeding cattle?
A. I have fed considerable cattle in my time.
Q. Do you know what margin per hundred pounds on the cattle is necessary for a man to feed a bunch of cattle like you saw Mr. Roloson buy until they are well matured, well fattened in order that he may not lose anything, come out even?
A. That would depend on what you call a matured steer. If you feed a steer until some of us would call him ripe it would cost $1.50 a hundred, but if you feed a steer until you get him reasonably fat, good merchantable condition he possibly might get out at 75 cents to a dollar.
Q. That much more per hundred than he paid?
A. Yes, but there's a good big difference between a finished steer and a fat steer: finished steer costs lots of money.
Q. The least would be 75 cents? To come out even?
537 A. Yes, I don't think he could get out under 75 cents if he fed them four months on a full feed of corn.

CLINT HULL was next called as a witness in behalf of defendant and being duly sworn testified as follows:

Direct examination by Mr. RANDOLPH:

Q. Your name is Clint Hull?
A. Yes sir.
Q. Where do you reside?
A. Here in St. Joseph.
Q. How long have you lived in St. Joseph?
A. About five years.
Q. Where did you live previous to that?
A. Lived in De Kalb County near Maysville.
Q. And where previous to that?
A. Near Weatherby.
Q. And you also lived near Fairport?
A. Yes sir.
Q. What business have you been engaged in Mr. Hull during your life?
A. Live stock trade.
Q. What are you engaged in now?
A. Selling stock on the market at St. Joe.
Q. Enga-ed on the market at South St. Joseph?
A. Yes sir.

Q. Did you know Eber B. Roloson during his lifetime?
A. Yes sir.
Q. How long did you know him?
A. About twenty years.
538 Q. Did you buy some stock of him in the Spring of 1900?
A. Yes sir.
Q. What stock did you buy?
A. I bought 59 head of cattle.
Q. Did you go to his farm to get them?
A. Yes sir.
Q. You know where his farm is?
A. I've been there quite often.
Q. Did you see him there that day?
A. Yes sir.
Q. What was he doing?
A. He came up there to show me the cattle.
Q. Where did he come from?
A. Weatherby.
Q. Did you go up with him?
A. No sir.
Q. Do you know how he went up?
A. Yes sir, he came up there in a buggy I think, I am not sure about that but I think he come in a buggy.
Q. Was he around with you during the day?
A. Yes sir.
Q. Did you weigh the cattle up?
A. No sir.
Q. What did you do?
A. I bought the cattle after I come to St. Joe; he shipped them down here; he come with them.
Q. You looked at them?
A. Yes sir.
Q. And then afterwards bought them?
A. Yes sir.
539 Q. What was his physical appearance at that time?
A. It was about like it always was I think.
Q. Describe him as near as you can.
A. He was a thin man, didn't appear very stout never, but always just about the same.
Q. How was he as to activity and endurance?
A. Just about the same apparently that he had always been.
Q. How had he been as compared to other men as to that, to endure work?
A. Well, when I was well acquainted with him he was pretty rugged and at that time of course I was only with him only a short time he seemed to be about as usual in his appearance.
Q. He was able, was he, to stand exertion?
A. Yes sir.
Q. What did you do that day about the cattle?
A. We looked at the cattle and talked trade and was around there

for, I don't know, two or three hours, maybe longer; I don't remember.

Q. Where were you during the two or three hours?

A. Out in the field most of the time I think.

Q. On your feet or sitting down?

A. We walked to see the cattle if I remember right, I think we did, they was out in a big pasture.

Q. That was what time of the year, what month, do you remember?

A. July 1900?

Q. Then when did you see him next?

A. I saw him next on Monday, he delivered the cattle here on Monday.

540 Q. Where did you see him then?

A. In the yards.

Q. What was he doing that day?

A. He shipped the cattle; I bought the cattle on St. Joe weights delivered here.

Q. What part did he take in handling the cattle do you know?

A. I suppose he loaded them; he shipped them anyhow—of course I didn't see him. He had nothing to do with them after they come here I took charge of them, although he was around with me all day.

Q. Around with you?

A. Yes sir.

Q. How did he endure the exertion?

A. Fairly well, I guess.

Q. Did you notice any weakness about him or anything?

A. Not particular, no sir.

Q. Do you know what time he got in with the cattle?

A. If I remember right, about nine or ten o'clock in the morning.

Q. And he would necessarily have had to travel a considerable part at night?

A. I should think so.

Q. And if I understand you his appearance was vigorous and all right the next day?

A. Yes, about like as I had always seen him.

Q. Did you see him the next year?

A. Yes sir.

Q. How was he then?

A. About the same I think; I don't remember after that when I saw him was when he was down here, he was down here frequently.

541 Q. Did you see him any the Summer before he died?

A. I think so.

Q. How was his appearance then?

A. About as usual I think.

Q. What experience have you had in feeding cattle?

A. Pretty near a lifetime.

Q. Your father had twelve or fourteen hundred acres of land by Mr. Roloson?
A. Not very far away.
Q. How many head at times were fed there?
A. Oh sometimes 100, sometimes 300 or 400.
Q. Now Mr. Hull, if a steer is purchased at any certain price per hundred pounds, and corn is worth 40 cents a bushel, and the steer is fed until it is fat and ready for market, about 4 months how much advance per hundred pounds must it be sold at to come out even?

Objected to by defendant as assuming a state of facts not shown by the evidence, and no foundation laid.
The COURT: These cattle were not fed by corn. I think the evidence shows that this cotton seed meal cost as much as corn or more.
Mr. RANDOLPH: Both were fed, but I am taking it on the corn because the cotton seed meal was more expensive feed.
The COURT: I will allow the question.
To which ruling of the Court defendant at the time excepted.

A. That would be a pretty hard question for me to answer.
Q. I will put it this way: Suppose the cattle were bought at 4.75, and upon being fed four months what price should they be sold at to come out even, so there would be no loss, if corn was 40 cents
542 a bushel?
A. I should judge around five dollars to five and a quarter.
Q. You think they would come out even on 50 cents advance?
A. No sir, I don't think they would.
Q. Would 75 cents bring them out even?
A. Well sir, I couldn't say; I judge somewheres around a dollar.

Cross-examination.

By Mr. KERR:

Q. At what time in the Fall of 1900 did you visit Mr. Roloson at his farm?
A. The 7th or 8th of July.
Q. And you saw him shortly afterwards in St. Joe?
A. Yes sir.
Q. And then not until the next year?
A. I don't know.
Q. You don't know that you did?
A. No sir.
Q. And would you say you saw him during the year 1901 or did you see him at all?
A. Yes sir, I think—I know I did, but I just can't tell you the times.
Q. Where would you see him then?
A. Meet him here, which I did frequently, and very frequently I was there, Weatherby, the town he lived in.
Q. And during the year 1902 I suppose?
A. Yes sir.

Q. And he was always strong and vigorous when you saw him?
A. I said he always looked about the same to me.
Q. And always did right down until the last time you saw him?
543 A. Yes sir, so far as I saw of him.

Mr. I. F. RIGGS was recalled and testified further as follows:

Direct examination.

By Mr. RANDOLPH:

Q. Mr. Riggs, Mr. Kerr asked you to obtain a date for him as to when Fred Leard nursed Mr. Roloson, or at least if he was paid for it—have you that date?
A. Yes sir.
Q. What is the date?

Mr. KERR: I asked that the witness produce the book which would show the date. I object to his testifying now without that. He said he could not before.

Q. Have you got the book?
A. Yes sir.
Q. Let's see the book—is that the receipt for it?
A. No sir.
Q. What is this?
A. That is a warrant.
Q. Will you state the date of that warrant?
Mr. KERR: When your warrants were issued they were left in this book without being detached and were considered as an order authorizing you to pay the money?
The WITNESS: Yes sir.
The COURT: What was the date when this payment was made?
The WITNESS: September 21, 1900, the amount $2.50.
Q. And what is it specified to be for there?
A. Nurse hire for E. B. Roloson.
Q. To whom?
A. Fred Leard.
544 Q. For how long a time was that? How many days or nights' service was that?
A. Two.
Q. Two nights' service?
A. Yes sir.

D. S. McCURLEY was next called as a witness on behalf of plaintiffs, and being duly sworn testified as follows:

Direct examination.

By Mr. RANDOLPH:

Q. State your full name?
A. D. S. McCurley.
Q. Where do you live?

A. De Kalb County.
Q. What part of De Kalb County?
A. Right east of Weatherby, eastern part.
Q. How long have you lived there?
A. Something over thirty eight years.
Q. Mr. McCurley, did you know Eber B. Roloson in his lifetime?
A. I did.
Q. How long had you known him?
A. I can't say just how long it was since I first known him.
Q. You have lived at the same place you live for 38 years?
A. Yes sir.
Q. Did you know him during his residence at Weatherby?
A. I did.
Q. Both times he lived there?
A. Yes sir.

Q. State whether or not you have met him on various
545 occasions during the last few years of his life?

A. I met him in town there as I went in; was around with him quite frequently.
Q. Do you remember of any special occasions that you met him and was with him?
A. Yes, I remember of one particular time that I met him.
Q. What was that particular time?
A. I remember meeting him on the afternoon and evening of January 4, 1900.
Q. What was the occasion of your meeting him that time?
A. Well, there was an organization of Rebecca Lodge in Weatherby, I remember of him being present that afternoon and also during the institution of the lodge.
Q. How late did he stay up that night?
A. Well, it was about two o'clock when we got through with the organization and supper—we had a supper there and had several of us there during the afternoon preparing for the supper, and Mr. Roloson was there with us and assisted in arranging the table and he was also at the institution and the conferring of the Rebecca degree during that night.
Q. Did he remain until two o'clock in the morning?
A. He remained until after the supper was over, something near two o'clock.
Q. How did he stand that loss of sleep and exertion Mr. McCurley?
A. I thought he stood it as well as any of us; he seemed to be enjoying himself during the whole proceeding.
Q. Did you see Mr. Roloson the night of the election in 1900, or about that time?

A. I don't remember whether I saw him that night or not.

546 Q. Was there any gathering there that night at any of the halls in the city?

A. There was.
Q. Do you remember whether he was up there or not?
A. I can't say as to whether he was there or not; I can't remember.

Q. Did you see him during the years 1901 and 1902?
A. I did.
Q. What was his appearance as to health during that time?
A. Well I couldn't see any great change in him in any way.
Q. Did you notice any change except that of increasing age?
A. Nothing, no.
Q. Did you see him along in the Summer of 1902 before he died?
A. I did.
Q. How did his condition remain at that time?
A. His condition was about as it had been.
Q. How was he about getting around, about activity?
A. Well he got around about as well as the average of men.
Q. Did Mr. Roloson have any cough?
A. I don't remember of ever hearing him cough.

Cross-examination.

By Mr. KERR:

Q. Did you see him very frequently during the years 1900, 1901 and 1902?
A. I did.
Q. Did you not say and is it not now your opinion that he was during those years in a rather feeble condition?
A. It is not.
Q. He was not in a feeble condition?
A. It is not my opinion.
Q. Did you ever say he was rather feeble during those
547 years or any one of them?
A. Not to my recollection.
Q. Will you say you never said that or never thought that—as a matter of fact he was not a very strong man at any time, was he?
A. Well, I don't know that he was not a strong man.
Q. Would you say he was always, as far as you know, a strong man?
A. So far as I knew he was a strong man.
Q. That would be your description of him would it?
A. Well, he was a strong man for a man of his build.
Q. As a matter of fact, wasn't he a rather delicately constituted man, and delicate in appearance? Wouldn't he rather strike one that way?
A. I don't know that he would.
Q. He never struck you that way?
A. No sir.
Q. You never thought of him as a delicate man, but always as a strong man?
A. A man of his build, not a big, powerful man; of course he was not a large man.
Q. What was the color of his skin?
A. Well, the color of his skin was that of a fair person in the sun and wind a great deal.
Q. Sort of sallow, wasn't it?

A. Sort of sun-burned.
Q. You belong to some organizations to which he belonged?
A. I do.
Q. Are you related to him or his family in any way?
A. In no way.
548 Q. Nor to the Riggs's?
A. Nor to the Riggs's.
Q. Where do you live now, in Weatherby?
A. Well, I am slightly related to one of the Riggs's by marriage. One of the Riggs married a third cousin of mine.
Q. That is the only relationship that exists between you?
A. That is the only relation, yes sir.

Mr. RANDOLPH: We will read the medical report of Dr. Baker. It has not been read to the jury yet. It is the same report hereinbefore copied and marked Exhibit "D," the same is read in evidence.

549 Mr. HEWITT: I will read the answers made by the medical examiner in the matter of the issuing of the first policy in suit, November, 1901. It is here read and is hereinbefore copied in connection with copy of the policy.

550 Mr. HEWITT: I will read the medical examiner's report under the second policy issued in this case dated May 10, 1902, it is here read and is hereinbefore copied in connection with copy of the policy.

551 JOHN W. RIGGS, JR., was next called as a witness in behalf of plaintiffs, and being duly sworn testified as follows:

Direct examination.

By Mr. RANDOLPH:

Q. State your full name.
A. John W. Riggs.
Q. Where do you live?
A. Weatherby, De Kalb County, Mo.
Q. What business are you engaged in?
A. Mercantile business.
Q. What is the name of the firm?
A. De Hart and Riggs.
Q. This is your partner, Mr. De Hart here, one of the plaintiffs in this case?
A. Yes sir.
Q. Did you know Eber B. Roloson in his lifetime?
A. Yes sir.
Q. How long did you know him?
A. 25 to 30 years.
Q. How old are you?
A. 38 years old.
Q. Did you know him during his residence at Weatherby?
A. Yes sir.
Q. Did he ever work in your store?

A. No sir.
Q. Did he ever help about the store?
A. Once in a while when we were busy he helped us a little.
Q. Never was employed there?
A. No sir, never was employed.
552 Q. Have you ever been with him on any special occasions you could call to mind now?
A. Yes sir, I have.
Q. Now tell the jury of the different occasions you have been with him.
A. I don't remember of but one occasion I was ever with him. It was in the Spring of 1900. I had a male hog borrowed from him and he helped me take it back to his place in Weatherby where he lived.
Q. What did you have to do, drive it?
A. He drove it. He got in the pen and tied it, I opened the gate and let him out.
Q. Just tied a rope around its foot to drive it?
A. Yes sir.
Q. How big a hog was it?
A. I would take it to weigh 200 pounds, something near that.
Q. How did Mr. Roloson seem to endure the exertion of such work?
A. Very well.
Q. Do it as well as the average man?
A. As well as the average man.
Q. Do you remember the election in 1900?
A. Yes sir.
Q. Were you with him the night of the election?
A. Yes sir.
Q. Where was he that time?
A. In the hall over the drug store at the corner.
Q. What was going on there?
A. We were receiving election returns and later in the night there was some betting done that he participated in.
553 Q. How late at night was he there?
A. I think he left the hall at one o'clock.
Q. How did he stand that loss of sleep?
A. As well as any of us so far as I know.
Q. Did you see him around the next morning?
A. I don't remember the next morning.
Q. Do you remember anything about the institution of the Rebecca Lodge there?
A. I remember the institution of it; I don't remember any circumstances in connection with it.
Q. Did you sell him any corn in the Fall and Winter of 1901?
A. 1901? I don't remember whether we furnished him his feed that year or not but I don't believe we did.
Q. Do you remember what year you did furnish him his feed?
A. We furnished him his feed in 1898 and later on one or two seasons but I don't remember the dates.

Q. Don't remember whether it was 1901 or not?
A. No sir.
Q. Do you remember anything he did in connection with getting corn out there when you did sell it to him?
A. Yes sir, he attended to it personally.
Q. You have known him you say 25 or 30 years—about ever since you can remember well?
A. Yes sir.
Q. What was his physical condition and make-up and appearance?
A. It was that of an average man.
Q. Now Mr. Riggs, how was he in his dress?
A. Well, I don't know hardly; dressed as an average man. He wasn't flashy or anything of the kind; dressed ordinarily, very modest.
554 Q. Neat?
A. Yes sir.
Q. Was he dressed in a way to make him look refined and neat, or make him look rough?

Objected to by defendant as incompetent, irrelevant and immaterial.

The COURT: You may ask that particular question as to whether he was dressed neatly or roughly. If he laced you may show it. The objection to that question is sustained.

Q. Was his dress and appearance neat or was it rough?
A. It was neat.
Q. How constantly and often did you see him Mr. Riggs during the last two years of his life?
A. When he was in Weatherby I saw him, Oh, nearly every day; I don't——
Q. Was he out of town sometimes?
A. Yes sir.
Q. Where did he go? To his farm? Did you see him driving out?
A. Yes sir.
Q. See him driving back?
A. I don't know; I suppose I did see him drive up occasionally.
Q. How was he as to getting up—getting around early?
A. He got up early.
Q. How was he as to sitting up late?
A. Stayed up as late as any of us.
Q. Did you sell him the Acme Stock Food the Winter before he died?
A. Yes sir.
Q. Do you know how much that amounted to?

Objected to by defendant as irrelevant, incompetent and
555 immaterial under the facts in the case and under the evidence.

The COURT: The objection will be overruled.

To which ruling of the Court defendant at the time excepted.

Q. Do you know how much that was per ton?

A. No sir, Mr. De Hart attended to the Acme Food business and I am not conversant with it as well as he is. I don't remember what we sold it at.

Q. Did you ever hear Mr. Roloson cough?

A. No sir.

No cross-examination.

Mr. FITCH was next called as a witness on behalf of plaintiffs and being duly sworn testified as follows:

Direct examination by Mr. RANDOLPH:

Q. State your full name.

A. William M. Fitch.

Q. What is your business?

A. I am an attorney-at-law.

Q. State whether or not you made up the proofs of loss under the policies in suit in this case.

A. I assisted the probate court in getting out copies of the records, including the will, which were attached to the proofs of loss. I did not take the affidavits or the jurats to any of the proofs of loss as I remember, but I assisted in the preparation of all records in the probate court.

Q. Have you anything to show when the proofs of loss were received by the company?

A. There are some registry receipts in some of the papers; I don't remember whether they are from this particular company or
556 not, but several of those receipts are the 16th day of March.

Q. Do you remember whether or not they were all sent about the same time?

A. They were all sent about the same time.

Q. Were the proofs of loss all alike?

A. There were some minor changes are required by each different company, different insurance company; in other words, each company furnishes its own blanks in each case.

Q. State as near as you can the date when those proofs of loss were mailed.

A. As near as I can remember it was near the middle of March, 1903.

Witness is shown "Exhibit L."

Q. Are you acquainted with that Mr. Fitch?

A. Yes sir, I recognize some signatures here.

Q. What is the date of that?

A. 14th day of March 1903.

Q. You helped prepare this one?

A. As I stated, I don't remember that I helped prepare the blanks themselves, but I assisted in the preparation of all copies from the probate court records, including the copies of the will, and the different blanks were substantially the same in all cases.

Mr. RANDOLPH: He admitted that the proofs of loss had been made at the outstart of the case.

Mr. KERR: I offer in evidence this "Exhibit L."

Mr. RANDOLPH: I object to it, just to keep the record within some bounds, on the ground that he has admitted the proofs of loss.

Which objection was by the Court sustained.

557 Mr. RANDOLPH: We rest, unless we should have some matter that is technical.

Mr. KERR: We desire to recall Dr. Lee before they rest.

The COURT: Very well, call him.

Dr. LEE was recalled and testified further as follows:

Cross-examination by Mr. KERR:

Q. Calling your attention to the statement on the back of Exhibit L, doctor, in whose handwriting is that?

A. Part of that is my handwriting.

Q. And part of it in whose else?

A. I recognize Clark Packard's.

Q. You signed it, did you not?

A. Where?

Q. Where the name "L. E. Lee, M. D.," is written?

A. Yes sir.

Q. And swore to it before Mr. Packard as a notary public?

A. Yes sir.

Q. And knew what the contents of it were before you did sign it and swore to it, did you not?

A. I don't know that there was any attachment made to it.

Q. Whose handwriting is this, the answer to question 6?

A. That is mine.

Witness is shown Exhibit M.

558 Q. You are acquainted with the signature of Eber B. Roloson, doctor? And were during several years before his death?

A. Yes sir, that is my signature.

Q. And the other signature here, Eber B. Roloson, is his signature made at the same time in your presence is it not?

A. I think so.

Q. And the answers given there were written down by you?

The COURT: Which one do you refer to?

Mr. KERR: I am calling his attention to the answers to the medical examiner. He has signed and Mr. Roloson signed on the same page

A. Yes sir.

Q. And the signature on the front page is also Mr. Roloson's?

A. Yes sir.

Q. Now doctor, these answers to the medical examiner were given on or about the 6th day of August 1902, and your medical examiner's report bearing the asme date was made at the same time?

A. I presume so.

Q. Did you make a medical and physical examination of Mr. Roloson at that time?

Mr. RANDOLPH: We object for the reason that that has all been gone over with this witness on cross examination.

The COURT: Objection overruled.

A. Yes sir.

Q. And set down herein the result of your medical examination.

A. If this is the report of my medical examination it is because I always examine them.

Q. It is signed by you is it not?

A. Yes sir.

559 "Exhibit N" is shown to witness.

Q. Doctor, here is the examination and report for the Union Life Insurance Company. These are your signatures are they not?

A. Yes sir.

Q. And the signatures "Eber B. Roloson" are those of Mr. Roloson who has been mentioned in this case, the signatures on the first and second pages?

A. Yes sir.

Q. And this is a medical examination and report made by you at or about the time it appears dated in connection with an application for insurance, is it not?

A. Yes sir?

A. Yes sir.

Q. And that examination was made as you have indicated you always made your examination?

A. Yes sir.

Witness is shown "Exhibit O."

Q. That is the signature of Mr. Roloson?

A. It is I think.

Mr. KERR: If the Court please I now offer in evidence the medical examination as set forth in Exhibit N and the application Exhibit "N," application by Mr. Roloson in June 6th, 1902, and the medical examination by this defendant. Also the medical examination set forth in the application marked Exhibit "M."

Plaintiff objected to the introduction of said writings and they were excluded by the Court. No exception saved to said ruling.

560 Q. Exhibits P. and Q, doctor, were executed by you at about the same time they bear date, were they not?

A. Yes sir.

Mr. KERR: I offer in evidence "Exhibit P."

Mr. RANDOLPH: We object to it for the reason that it is immaterial.

The COURT: Objection sustained. No exception.

Q. You had known Mr. Walcott for how long before you made any of these examinations—this examination say in November, 1901?

A. Was that the first examination I ever made for Mr. Roloson?

Q. Well, I don't know. It is the first examination for this company. This one you said Mr. Walcott was the agent I think.
A. What date is that?
Q. November 1901.
A. I believe that is the first time I ever saw Mr. Walcott to my knowledge.
Q. You never had any connection of any kind with an insurance company up to that time, this insurance company——

Mr. RANDOLPH: He was constituted their agent and they cannot in any manner contradict anything that he did. We have a statute that provides that the examining physician is their agent.
The COURT: I will see how far this will go. I will allow him to answer that question.

Q. You never had any connection with an insurance company up to the time Mr. Walcott came there and spoke to you about making this examination?
A. No sir.
Q. Can you remember now whether Mr. Walcott remained in Weatherby until your examination was completed?
A. I think he did.
Q. This company's home office is Minneapolis, Minn.?
A. Yes sir.
Q. Did you send this there or did some one else send it there?
A. I believe I let Walcott have it.
531 Q. At all events, you are not sure, are you? Either he sent it to the home office at Minneapolis or you did, and you think it was he? Now Doctor, do you know an insurance agent named Hall, A. Hall, who took out this other application in the Union Life, to which I called your attention a moment ago?
A. I knew a man named Hall who was an insurance agent.
Q. The one whose name is attached to this other application here?

Mr. RANDOLPH: We object to anything about A. Hall for the reason that he has no connection with the insurance in suit in any way.
The COURT: The objection is overruled.

A. I don't know his signature.
Q. How long have you known the man?
A. No personal acquaintance with him except in connection with some insurance.
Q. Had you any acquaintance with him up to the time of the issuance of this policy?
A. Not that I know of.
Q. This man Walcott here, connected with the application for the Union Life is the same one that took the application in the case of the Northwestern, isn't it?
A. Yes sir, I suppose it is.
Q. Are you clear in your mind that you did not know Mr. Hall before this?
A. No sir, I am not positive.

Q. I asked you on Friday, Doctor, if you would please ascertain if you had any memorandum or any book which would enable you to testify exactly when you began making physical examinations of Mr. Roloson for life insurance, and you said you would.
562 Have you made such search?

A. Yes sir.

Q. And have you any books that will show when you made the first examination for Mr. Roloson?

A. Yes sir.

Q. And when was it? Have you got those books here Doctor?

A. I have not.

Q. When was the first examination you made?

A. I believe it was in April or May 1901, I am not certain which.

Q. Do you know for whom you made that examination?

A. For what agent?

Q. Or company?

A. I do not.

Q. Had Mr. Roloson been a patient of yours before that time?

A. He had not.

Q. Do you know whether this examination you have just referred to was before or after the talk you had with Dr. Isaacs about the application made to the State Life being rejected?

A. I don't remember whether it was before or after. I believe it was after.

Q. I believe you stated that you thought it was some time in March that Dr. Isaacs talked to you about the action of the State Mutual Life, and his examination of Mr. Roloson?

A. I think so.

Q. And after that you examined Mr. Roloson for several companies but you can't tell what ones?

A. I don't know what ones. I think possibly two or three that year.

Q. And several thereafter, in the year 1902?
563 A. I think so.

Q. In your report to this company you don't say anything about the fact that Mr. Roloson had been rejected, or that Dr. Isaacs had given an unfavorable report?

A. I didn't know any such fact.

Q. Didn't Dr. Isaacs talk to you about it and tell you he had given an unfavorable report to the State Life?

A. No sir.

Q. He never talked to you about it?

A. He did not.

Q. On the stand here on Friday, did you not testify to two conversations with Dr. Isaacs, one in your office and one out standing by your buggy?

A. I remember the one we had when I was standing by his buggy—you had reference to the conversation we had there?

Q. Yes—did you not testify to two conversations?

A. Yes sir.

Q. And did you not say that in that conversation in your office

he told you that the State Life had on his advice rejected Mr. Roloson?

A. He did not, to my knowledge.

Q. You never heard of it?

A. No, I didn't know he had been rejected.

Q. In order that there may be no misunderstanding about it, I want to call your attention to your conversation with Mr. Groomer, to which I referred the other day—where was Mr. Groomer's office?

Mr. RANDOLPH: We object to his going over matters that
564 were gone over in the former cross examination.

The COURT: I assume that counsel has something new which he wishes to bring out. I don't know what it is. Objection overruled.

To which ruling of the Court plaintiff at the time excepted.

Q. Where was Mr. Groomer's office in 1901?

A. On the west side of the street near the lumber yard.

Q. Where was Dr. Isaacs' office?

A. I believe it was adjoining.

Q. How far is that distant from your office?

A. That was at that time about half a block across the street in a diagonal manner from my office.

Q. Do you remember, doctor, any conversation that you had with Mr. Groomer in Weatherby about the month of March 1901 about Dr. Isaacs rejecting Mr. Roloson?

A. No sir, I do not. I didn't know that Eber Roloson had ever been rejected for life insurance.

Q. Now during that Spring, in the village of Weatherby, did not you and Mr. Groomer have a talk, in which he asked you if you had examined and passed Eber Roloson, and that Isaacs had examined and rejected him for the other company, and did you not state then and there that you had passed Roloson because you were a young man, just starting in, and you wanted his patronage, or words to that effect?

A. I did not.

Mr. RANDOLPH: We object on the ground that the question involves material and immaterial issues, and he should separate it so as to bring out only what would be a material issue.

The COURT: Overruled. Let it stay.

565 Q. I asked you the other day about a conversation had with Thomas Smith—have you thought about that since?

A. Yes sir.

Q. You were Mr. Smith's medical adviser?

Mr. RANDOLPH: We object for the reason that it has been already gone over.

The COURT: The objection is sustained to going over the same ground.

Mr. KERR: I want to ask now if Mrs. Smith was present at that conversation.

The COURT: Very well.

Q. You were his medical adviser and out to his house occasionally?
A. Yes sir.
Q. Do you remember a conversation with Mr. Smith, in the presence of Mrs. Smith in the Spring of 1901 when the conversation I asked you about the other day took place, in substance?
The COURT: You will have to repeat the conversation.
Q. And that this conversation, at their house, in the year——

Mr. RANDOLPH: I object to his putting the question again. It has all been gone over.
The COURT: Objection overruled. Counsel can put a question at least.

Q. —the year 1900 or 1901, when you and Mr. Smith and Mrs. Smith were talking about John King getting into the fraternal lodge?
A. I don't——

Mr. RANDOLPH: We object to that and ask that the answer be stricken out.
The COURT: Objection overruled.

566 Q. Didn't you at that time and place state that there was a man in your town of Weatherby that would never have been taken into the lodge if you had had anything to say about it because of the looks of the man, because he was not a fit subject for any person to insure, and didn't Mr. Smith then ask you who was the man, and did you not answer that it was Eber Roloson.

Objected to by plaintiffs as having been gone over.
The COURT: You may answer.

A. I believe I stated I had no recollection of it.
Q. Or words to that effect—words in substance as I have read them?
A. I don't remember.

Mr. RANDOLPH: There is another objection to that—he has fixed no date, nor even approximated it.
Mr. KERR: I said in either 1900 or 1901.
The COURT: The answer may stay.

Redirect examination.

By Mr. RANDOLPH:

Q. Can you tell the date of the examination for the Union Life Insurance Company that Mr. Walcott was agent for—refresh your memory from this paper and state whether it was before or after the policies in this suit were issued.
A. I am not certain whether I made the examination for the Northwestern first, or after this.
Q. What is the date here?
A. This is June 6th.
Q. What year?
A. 1902.

Mr. RANDOLPH: We omitted two things. One was the medical

examination by Dr. G. W. Isaacs which he was cross ex-
567 amined about and we offer it in evidence. We want to read that.

The COURT: Very well.

This is the medical examination contained in the application of Eber B. Roloson to the State Life Insurance Company of Indianapolis, Indiana, hereinbefore copied in full.

Mr. RANDOLPH: We want to introduce Miss Anna Tull, we forgot that.

Miss TULL was called as a witness in behalf of plaintiffs and being duly sworn testified as follows:

Mr. RANDOLPH: My associates think this is purely cumulative and perhaps we had better not weary the Court.

The COURT: Use your own judgment about that.

Mr. RANDOLPH: Well, Miss Tull you may stand aside.

Mr. RANDOLPH: I think that is all.

Defendant's Rebuttal.

THOMAS SMITH was called as a witness in behalf of defendant and being duly sworn testified as follows:

Direct examination.

By Mr. KERR:

Q. Where do you live?
A. I live about six miles north east of Weatherby.
Q. You are a farmer there?
A. Yes sir.
Q. How long have you lived there?
A. Be eight years this March.
Q. You are a married man?
A. Yes sir.
Q. Were you acquainted with Dr. Lee during the years 1900 and 1901?
A. Yes sir.
568 Q. Did he and you belong to the same order at that time?
A. We did, to the Fraternal.
Q. Who was your medical attendant during those years?
A. Dr. Lee.
Q. Do you remember an occasion when he visited your house during the Winter of 1900 and 1901 when you and he and Mrs. Smith had a conversation about John King entering the Fraternal lodge?
A. Yes sir.
Q. Did, or did not, Dr. Lee at that time, in the presence of you and Mrs. Smith, state, speaking about the admission of John King to the Fraternal Lodge, that there was a man in Weatherby that he would never have taken into the lodge if he had been medical examiner because from the looks of the man he was not a good risk,

and you asked him who it was, and did Dr. Lee say it was Eber Roloson?

A. Yes sir.

Q. That is substantially what was said?

A. Yes sir.

Cross-examination.

By Mr. RANDOLPH:

Q. How far do you live from Weatherby?

A. Six miles north east.

Q. How long have you been living over there?

A. Eight years this March.

Q. How long have you known Dr. Lee?

A. Ever since '91 I guess.

Q. 1901?

A. He has been doctoring for me ever since I have been there, eight years, been my family physician.

Q. And you say that he said that from Roloson's appear-
569 ance he did not believe he would have taken him in?

A. Yes sir.

Q. Just from his general looks?

A. Yes sir.

Q. He had never come in contact with him at that time?

A. Who?

Q. Dr. Lee.

A. I guess not, I don't know about that. That is something I can't say.

Mrs. SMITH was next called as a witness on behalf of defendant and being duly sworn testified as follows:

Direct examination.

By Mr. KERR:

Q. You are the wife of Mr. Smith, who was just upon the stand?

A. Yes sir.

Q. You are acquainted with Dr. Lee?

A. Been acquainted with him I guess about eight years.

Q. Do you remember the occasion during the Winter of 1900 and 1901 when he visited your house and when there was some talk about John King getting into the Fraternal lodge?

A. Yes sir, I remember his being there, but I don't know just the day of the month.

Q. At that time did Dr. Lee say in your presence substantially as follows: That there was another man in Weatherby that he would never have taken into the lodge if he had been medical examiner because of his looks?

A. Yes sir.

Q. And your husband asked him who he was and Dr. Lee said it was Eber Roloson?

570 A. Yes sir.
Q. That is substantially the conversation which took place?
A. Yes sir, that was the conversation.

Cross-examination.

By Mr. RANDOLPH:

Q. When were you subpœnaed?
A. Saturday night.
Q. Where did John King live?
A. He lived in Santa Rosa.
Q. Santa Rosa is seven or eight miles north east of Weatherby, isn't it?
A. Yes sir, I guess it is.
Q. Over right on the Daviess County line—its the next station north on the O. K. Railroad?
A. Yes sir.
Q. And did Dr. Lee know King?
A. I don't know anything about that, whether he did or not.
Q. He didn't claim that he knew him, did he?
A. He never said anything much about him; we just brought up the conversation.
Q. Who brought it up?
A. I don't know who first started it now, just between us, because we thought he was not a——
Q. When did you think of it again after it happened?
A. I hadn't never paid much attention nor thought much about it until since this trouble.
Q. Never thought anything about it?
A. No, not very much; didn't think of anything when we was talking.
Q. Just talking back and forth in the room?
571 A. Yes sir.
Q. And he thought from Mr. Roloson's looks he would not be a good insurance risk?
A. That is what he said.
Q. That is what you thought he meant?
A. That is what I thought he meant.
Q. And there has been nothing in five years now, nearly six years, to call that to your mind?
A. No, not that I know of specially; I never thought much about it.
Q. Who was it first told you that that conversation took place, recently?
A. I don't remember.

Redirect examination.

By Mr. KERR:

Q. Counsel has asked you a question just now which was peculiarly unfair——

Mr. RANDOLPH: I object to that statement by the attorney.
The COURT: I think it is an improper statement.

Q. Counsel then asked you a question who first told you about this conversation having taken place lately. Did any person tell you about this conversation, or is it something you know of your own knowledge?

A. It is something I know myself, and he said it, of course
The COURT: Do you remember when that conversation took place?
The WITNESS: I don't remember just what time it was.
The COURT: Do you remember what year it was?
The WITNESS: Not exactly. It was between 1900 and 1901, but I don't know just what time in the year.

Mr. GROOMER was recalled and testified further as follows:

572 Direct examination.

By Mr. KERR:

Q. Do you remember having a conversation in the Spring of 1901 in the village of Weatherby with Dr. Lee, in which you spoke to him about Dr. Isaacs having rejected Mr. Roloson, and asked Dr. Lee how it was he could pass him?

A. Yes sir.

Q. Did Dr. Lee in that conversation and at that time and place say to you that he had examined Roloson and had passed him because he was a young man, just starting in his practice, and he wanted Roloson's patronage, or words to that effect?

A. Yes sir.

Cross-examination.

By Mr. RANDOLPH:

Q. Where did that conversation take place?
A. It was between the lumber yard and his office.
Q. When was it?
A. It was sometime in the Spring of '91.
Q. '91.
A. '91.
Q. You say it was some place between the lumber yard and his office where were you standing?
A. Out in the road, or in the street.
Q. That was in the Spring of 1901 you say?
A. Yes sir.
Q. What company did he say he had examined Roloson for at that time?
A. I didn't ask him.
Q. Now when was it you left Weatherby?
A. I left Weatherby in 1902.
573 Q. You left in the night when you left?
A. No sir I did not. I moved away in the morning.
Q. Early in the morning?

A. I think I took one load to Pattonsburg and stayed all night and took one the next day.

Q. You were standing out in the road were you not?

A. Yes sir.

Q. In the middle of the road?

A. Street, or whatever you call it.

Q. What brought up the conversation?

A. I had been talking to Dr. Isaacs and I had with Mr. Roloson and I found out that Dr. Isaacs had rejected Roloson and I was anxious to know if Mr. Lee could pass Mr. Roloson.

Q. What did you want Mr. Lee to pass him for?

A. I don't know as I wanted him to.

Q. What were you interesting yourself for?

A. Mr. Roloson he was a friend of mine; he would come and see me pretty often.

Q. Come there about the lumber yard?

A. Yes sir.

Q. So you hunted up Dr. Lee did you, just to see what he would have to say?

A. I don't know as I hunted him up. I met him in the street and talked to him.

Q. Were you trying to get insurance for Roloson?

A. No sir.

Q. He didn't ask you to get it?

A. No sir.

Q. Was that the only purpose you had in talking to Dr.
574 Lee, pure curiosity?

A. He come up with his team, I was out in the road and I talked to him.

Q. Tell me just exactly what passed between you and Dr. Lee.

A. I don't know what all passed.

Q. I want you to tell all you can about the conversation that passed between you and Dr. Lee.

A. We talked about Mr. Roloson's insurance and I asked him if he could pass him or had passed him.

Q. What was the first thing you said to him?

A. Mr. Randolph, I don't exactly know.

Q. What do you remember of that conversation besides what you have said?

A. I don't know Mr. Randolph.

Q. Tell me how the conversation started and you brought about what was said back and forth.

A. Haven't I told you?

Q. Did you say to Dr. Lee, Hold on doctor?

A. No sir.

Q. Did he draw up when he saw you coming?

A. He stopped to tie his team, his hitching post is right in front of his office, close there.

Q. Was he out tying his team when he was talking to you?

A. Tying his team or about the buggy.

Q. Did you walk up to him and say "Dr. Lee, I am full of curiosity?"
A. No sir.
Q. Didn't say that?
A. No sir.
575 Q. You didn't say you were curious to know whether he had ever examined Eber Rol-son for life insurance did you?
A. No sir.
Q. How did you bring up the conversation.
Q. I asked him if Mr. Roloson had applied to him for examination.
Q. What did you ask him that for?
A. I thought I had a right to ask him any question I wanted to if it was civil.
Q. What was your motive?
A. I wanted to know if Dr. Lee had passed him.
Q. Why did you want to know that?
A. Because I knew that Dr. Isaacs had rejected him.
Q. What difference did that make to you?
A. Didn't make none, as far as that is concerned.
Q. Just pure curiosity?
A. Yes sir.
Q. You asked him if he examined Mr. Roloson for life insurance?
A. Yes sir.
Q. Then what did he say?
A. Said he had.
Q. Now Dr. Lee is a real jovial sort of fellow isn't he?
A. I think Dr. Lee is a nice man, always did.
Q. Straight, honest man?
A. I thought he was.
Q. He is jovial, isn't he, a joking fellow?
A. Yes sir.
Q. And when you are talking to him he is liable to turn anything off into a joke and go off into his office about his business?
A. I don't know about that.
Q. You know he is the busiest doctor in that part of the country?
576 A. He was at that time.
Q. Rides night and day almost?
A. I couldn't say he did then.
Q. He don't stop to talk much, does he?
A. No, he isn't——
Q. Just turns things off and goes ahead?
A. Yes sir.
Q. Now Mr. Groomer, you would not say that Doc. didn't kind of turn you off and walk off and say "Oh, I'm a young fellow, and just passed him, in a joking way?
A. I couldn't say whether it was a joke or not.

577 It is admitted that Eber B. Roloson was a citizen of De Kalb County, Missouri, at the time the policies in suit, each of them, were issued.

Mr. RANDOLPH: We want to show the value on the market of the hogs that died.

The COURT: Call your witness.

JOSEPH BAKER was recalled and testified further as follows:

Direct examination by Mr. RANDOLPH:

Q. Can you state the value on the St. Joseph market during the Fall and early Winter of 1902 of hogs averaging 200 pounds?

A. Well, they varied some little during the time, averaged about six seventy-five.

The COURT: Six dollars and seventy five cents a hundred you mean?

The WITNESS: Yes sir.

Q. Hogs were unusually high that Fall?

A. Unusually high that Fall, they were higher than that, and other times they were lower; they would make a good average of that price.

Mr. KERR: Defendant rests.

Plaintiff asks for the opening and closing of the argument on the ground that it was necessary for them to make some proof, which was the first evidence introduced.

The COURT: The application will be denied. Defendant is given the opening and closing arguments.

To which ruling of the Court plaintiffs at the time excepted.

The foregoing is all the evidence introduced and offered, together with the rulings of the Court with respect thereto and the exceptions of the defendant to such rulings.

578 Thereupon the defendant requested the court to charge the jury as follows:

1.

That the Missouri statute Sec. 7890 is not applicable to this case, neither to the issues thereof nor the policies involved therein nor either of them.

If the foregoing request be denied defendant requests the court to charge the jury:

2.

That said statute as applied to the facts in this case is unconstitutional and void and in conflict with Sec. 1, of the 14th amendment to the constitution of the United States.

Defendant further requests the court to charge:

3.

That plaintiffs cannot recover herein and that the verdict must be for defendant.

If the foregoing request be refused, defendant requests the court to charge:

4.

That if the jury find from the evidence that any one of the
579 warranties contained in the application for the policy sued on in the first cause of action be untrue, the verdict on the first cause of action must be for defendant.

5.

That if the jury find from the evidence that any one of the warranties contained in the application for the policy sued on in the second cause of action be untrue, the verdict on said second cause of action must be for defendant.

6.

That if the jury find from the evidence that the policy mentioned in the first cause of action was not delivered to and accepted by the insured while he was in good health, then the verdict on the first count must be for defendant.

7.

That if the jury find from the evidence that the policy mentioned in the second cause of action was not delivered to and accepted by the insured while he was in good health, then the verdict on the second count must be for the defendant.

8.

That the plaintiffs cannot recover on the first cause of action if the jury find from the evidence that at the time of his making the application for the policy therein sued upon Eber B. Roloson knowingly, falsely and fraudulently and with the purpose and intent to deceive and mislead defendant into accepting such application and issuing a policy thereon, misrepresented in said application any matter concerning his health, life, or physical condition, which would naturally and reasonably affect the action of defendant in considering said application and accepting or rejecting the same, and in such
580 case the Missouri Statute Section 7890 is not applicable, and if applied would be in violation of Section 1 of the 14th amendment to the constitution of the United States.

9.

That the plaintiffs cannot recover on the second cause of action if the jury find from the evidence that at the time of his making the application for the policy therein sued upon Eber B. Roloson knowingly, falsely and fraudulently and with the purpose and intent to deceive and mislead defendant into accepting such application and issuing a policy thereon, misrepresented in said application any matter concerning his health, life, or physical condition, which would naturally and reasonably affect the action of defendant in

considering said application and accepting or rejecting the same, and in such case the Missouri Statute Section 7890 is not applicable, and if applied would be in violation of Section 1. of the 14th amendment to the constitution of the United States.

10.

Plaintiffs cannot recover on count #1 if the jury find from the evidence that prior to the time of making application for the policy therein sued on Eber B. Roloson had been to his own knowledge rejected by any insurance company or association to which he had previously made application for insurance, and if with the purpose and intention of concealing such fact from defendant he in such application falsely and fraudulently and intentionally and with the purpose of deceiving defendant and inducing it to accept such application, warranted to defendant that no such rejection had been made.

11.

Plaintiffs cannot recover on count #2 if the jury find from the evidence that prior to the time of making application for the policy therein sued on Eber B. Roloson had been to his own knowl-
581 edge rejected by any insurance company or association to which he had previously made application for insurance, and if with the purpose and intention of concealing such fact from defendant he in such application falsely and fraudulently and intentionally and with the purpose of deceiving defendant and inducing it to accepting such application, warranted to defendant that no such rejection had been made.

12.

Plaintiffs cannot recover upon a policy if the jury find from the evidence that in his written application therefor Roloson knowingly, falsely and fraudulently and with intention to deceive and mislead defendant made therein any untrue warranty or representation to defendant concerning any matter then material to the risk of insuring his life.

13.

Plaintiffs cannot recover upon a policy if the jury find from the evidence that at the time of making written application therefor Roloson was afflicted with any ailment, disease, sickness, weakness or disorder which would naturally and reasonably tend to shorten his life.

14.

Plaintiffs cannot recover upon a policy if the jury find from the evidence that at the time of making written application therefor Roloson knowingly and with intent to deceive and mislead defendant into accepting said application and issue a policy thereon, concealed from defendant any material fact about his life, health, or physical condition, which would naturally and reasonably tend to shorten his life.

15.

The plaintiffs cannot recover upon a policy if the jury find from the evidence that at the time of making written application therefor Roloson willfully and intentionally in such application neg-
582 lected to answer fully, truthfully and completely every question therein asked and answered concerning his health, life and physical condition.

16.

The plaintiffs cannot recover upon a policy if the jury find from the evidence that at the time of making written application therefor said Roloson was afflicted with any ailment, sickness, weakness, disease or disorder which in any way or to any extent contributed to shorten his life.

17.

Plaintiffs cannot recover upon either policy if the jury find from the evidence that at the time of making written application therefor Roloson was afflicted with any unusual physical or mental condition which did in any way or to any extent contribute to his death.

18.

The plaintiffs cannot recover upon either policy if the jury find from the evidence that the final sickness or death of Roloson was in any way caused or contributed to by any sickness, disease, weakness or disorder existing in Roloson at the time of making the application for such policy.

19.

The plaintiffs cannot recover upon any policy if the jury find from the evidence that Roloson's life was shortened by any mental or physical condition existing at the time he made written application for such policy and which was not disclosed to defendant in the application for the policy.

20.

That the jury must find for the defendant on the first count of the petition if they believe from the evidence that at the time
583 of making the application for the policy therein sued on Eber B. Roloson was in bad health and knew said fact, and that he knowingly, falsely and fraudulently and with the purpose and intent to deceive and mislead defendant into accepting said application and issuing a policy thereon made the statement in said application that he was then and had been for twelve months in good health, and free from all ailments, diseases, weaknesses and infirmities, and that the defendant was deceived thereby and issued said policy when it would not otherwise have done so, whether any disease, weakness, or infirmity he then had contributed to his death or not; and in such case Section 7890 of the Revised Statutes of Missouri, 1899, is not applicable, and if applied would be in violation of Section 1 of the 14th amendment to the constitution of the United States.

21.

That the jury must find for the defendant on the second count of the petition if they believe from the evidence that at the time of making the application for the policy therein sued on Eber B. Roloson was in bad health and knew said fact, and that he knowingly, falsely and fraudulently and with the purpose and intent to deceive and mislead defendant into accepting said application and issuing a policy thereon made the statement in said application that he was then and had been for twelve months in good health, and free from all ailments, diseases, weaknesses and infirmities, and that the defendant was deceived thereby and issued said policy when it would not otherwise have done so, whether any disease, weakness, or infirmity he then had contributed to his death or not; and in such case Section 7890 of the Revised Statutes of Missouri, 1899, is not applicable, and if applied would be in violation of Section 1 of the 14th amendment to the constitution of the United States.

But the court refused to charge the jury as asked in said requests numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21, or either of them, to which action of the
584 court in so refusing to charge the jury as asked in said requests numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21, and in each of said requests severally the defendant then and there excepted.

And thereupon the court charged the jury as follows, viz:

GENTLEMEN OF THE JURY:

There is a preliminary matter to which I wish first to direct your attention: how the proceeds of a recovery in this case shall be disposed of, providing the plaintiffs shall recover, is a matter with which neither you nor I have any concern. The plaintiffs are suing as the executors of the last will and testament of Mr. Roloson. The policies by their terms are made payable to his estate. It is presumed that the plaintiffs are fit and capable men for the trust to which they have been appointed. They have been appointed executors by the Probate Court, and it is conclusively presumed by this Court that the court which made the appointment has faithfully discharged its duty. As executors of Mr. Roloson's estate it is the duty of the plaintiffs to collect in all demands due to that estate, and if any person whom they believe to be a debtor to the estate refuses to make payment of a claim, it is both their right and their duty to resort to such legal remedies as the law provides to enforce payment. In preparing this case for trial and producing witnesses here, and evidence, it is both the right and the duty of these plaintiffs to use all the skill and diligence which a just man would use in preparing his own case for trial. These, however, gentlemen, are matters with which we have no concern. They have been adverted to in the argument, and I call your attention to them, but it is your duty to lay them entirely to one side. The capacity in which the plaintiffs sue, the disposition which shall be made of the proceeds, in case a recovery

hall be had, are matters to which we have no right to attach any weight, or give any attention.

585 The plaintiffs bring this action to recover upon two policies of insurance, issued by the defendant to Eber B. Roloson, whereby in consideration of the representations and warranties contained in the applications therefor, and the payment of the premiums stipulated in the policies, the insurance company insured by each of the policies Mr. Roloson's life in the sum of $5,000.00. The first policy bears date November 21st, 1901, and the second policy May 14, 1902. The defendant admits the execution and delivery of these policies; it admits that Mr. Roloson in his lifetime paid all the premiums promptly that were due thereon; it admits that Roloson died on the 28th day of February, 1903; it admits that the plaintiffs in this cause have done everything entitling them to recover upon the policies, provided the policies are valid and subsisting obligations. That the defendant denies. In its answer it asserts that the policies are null and void by reason of the condition of Mr. Roloson's health at the time they were delivered, and by reason of certain untrue representations and warranties which he made and submitted to the company as an inducement for it to issue the policies.

The contract of the company is embraced in the policy, but, gentlemen, this is not a one-sided contract. It is a contract on the part of both Mr. Roloson and the insurance company. The contract of Mr. Roloson in the main is embraced in the written applications which he submitted to the company as an inducement for it to issue the policies. It was of primary importance to the company that it be informed as to the state of his health at the time he made the application, and as to any sickness or disease from which he had suffered previous thereto. For the purpose of eliciting from him information upon those subjects, it propounded to him in these applications certain questions. Mr. Roloson has answered those questions and he has warranted to the company by his contract that his answers to those questions are full and true. If his answers are not full and true, then he has violated the contract on his part, and the policies are void unless they are saved by a statute of the State of

586 Missouri, to which I shall call your attention later on. If Mr. Roloson's answers are not true and complete he has violated his warranties upon which the company relied, and upon which he agreed that it might rely in issuing the policies, and the policies are thereby rendered void, unless they are saved by the statute of Missouri, which I will presently explain to you.

It is not a question of Mr. Roloson's good faith or his knowledge in answering these questions. He did not present his answers simply upon his own information, but by his written contract he warranted to the company that his answers were true and full, and, as I have said, if the answers are not full and true he has violated his contract of warranty and forfeited the policies of insurance.

I will now call your attention to some of the more important questions which it is contended by the insurance company Mr. Roloson answered both untruly and incompletely.

The first question is number 14, in part 1 of his application. It

reads: Give name and address of each physician who has prescribed for or attended you within the past ten years and for what diseases and ailments and date. The answer to that is: "Name Dr. C. O. Patton, address McFall, Mo." Is that answer true or false? Is it complete or incomplete. The evidence, I think, without any contradiction, shows that Mr. Roloson had at least been treated in the early part of 1900, and shortly after his wife's death, by another physician, so that that answer is not full and complete, and whether it is incomplete and untrue in other respects is for you to determine upon the whole evidence.

I next call your attention to question number 2 in part 2 of the written application: "Are you now, and have you been in good health through all the past twelve months, and free from all ailments, diseases, weaknesses and infirmities? Answer: Yes." I next call your attention to question number 9: "Are you now, or have you ever been subject or pre-disposed to cough, expectoration, difficulty of breathing, or palpitation? No." You will notice the language of that question: "Are you now or have you ever been subject or
587 predisposed to cough?" That, I apprehend, would not cover the incidental coughing that goes with an ordinary cold. It implies some disease of a more permanent or abiding character than an ordinary cold, because it says: "Are you now or have you ever been subject or pre-disposed to cough."

I will next call your attention to question number 12: "Have you ever had any illness, local disease, injury, mental or nervous disease or infirmity, or ever had any disease, weakness or ailment of the head, throat, lungs, heart, stomach, intestines, liver, kidneys, bladder, or any disease or infirmity whatever?" "No." "If yes," state disease, nature, date, duration and severity of attack." You are to construe that entire language together. The words that are used in this application are not words of art; they are words of every-day life, and it is for you gentlemen, in case you find that Mr. Roloson was afflicted in any way, to determine whether or not his affliction or his health-impairment comes within the terms embodied in the application.

Then towards the last of this application is the following language; over the written signature of Mr. Roloson: "I hereby warrant that the written answers to the foregoing questions, as well as those in Part 1 of the application are my answers, and are full, complete and true, and that I am the person who signed Part 1 of this application; that I am not afflicted with any disease or disorder, nor have I had any illness, local disease, or personal injury not herein set forth."

Are Mr. Roloson's answers to those questions true and full? If so, that ends the issue so far as this application is concerned, and it would be your duty to find, as to that issue, in favor of the plaintiffs; but if you find that his answers are not true and full, then the policy is made void unless it is saved by the statute of this state, to which I will now direct your attention. I will read it to you with slight modifications, so as to give it a direct application to the present case:

No misrepresentation or false warranty made in obtaining a policy of insurance on the life of any person, a citizen of this state, shall be deemed material, or render the policy void unless the matter to which

such misrepresentation or false warranty relates shall have actually contributed to the death of the insured.

588 That statute was in force at the time these policies were applied for and at the time they were issued. It was the law of this state. Being a law of the state, it became a part, both of the policies and the applications, just as fully as if that statute had been expressly incorporated in the policy of application; and the policy should be construed by you and given effect in this case just as if that language had been incorporated among its provisions, and as if the policy read: No misrepresentation or false warranty made in obtaining this policy of insurance shall be deemed material, or render the policy void, unless the matter to which such misrepresentation or false warranty relates shall actually contribute to the death of Mr. Roloson.

Let me illustrate this. Suppose that Mr. Roloson, at the time he made application for this insurance, or at the time the policy was delivered, had been in fact afflicted with typhoid fever, and he falsely stated that he was free from any sickness or disease, but suppose that thereafter he completely recovered from typhoid fever, so that in no way contributed to cause his death, and that thereafter he died of some other disease, say of diphtheria, then under this statute his false answer as to the fact that he had typhoid fever would not be material, would not render the policy void, and would be wholly disregarded by you, so far as the written application is concerned.

In order to sustain the defense made by the insurance companies as to Mr. Roloson's representations and warranties in the written applications, you must find, first, that Roloson was, or had been, afflicted by some sickness or disease; second, that his answer as to such sickness or disease was untrue or incomplete; third, that such sickness or disease actually contributed to Mr. Roloson's death.

I now desire to call your attention to a provision of the policy. It is the first provision on the back of the policy. It reads as follows: "This policy shall not be in force until the first premium is paid, and the policy delivered to and accepted by the insured while in good health. Now, if you find that at the time either of these

589 policies was delivered to Mr. Roloson and accepted by him that he was not in good health, and that the sickness or disease from which he was suffering actually contributed to his death, then the policies never took effect, and it would be your duty to find in favor of the defendant. But if you find that he was well, or in good health at the time the policies were delivered, or, in case he was not in good health, that the sickness or disease from which he was suffering did not actually contribute to cause his death, then the fact of his sickness or disease would be wholly immaterial, and so far as this provision of the policy is concerned it would still be your duty to find in favor of the plaintiff.

The term "good health" is used in this provision of the policy, and it is used in the written application. What does it mean? I will read to you an accurate definition of it. "The term "good health" does not import a perfect physical condition. It would not be reasonable to interpret it as meaning absolute exemption from all

bodily infirmities, or from all tendencies to disease. It cannot mean that a man has not in him the seeds of some disorder. As has been well remarked by some of the law writers, such an interpretation would exclude from the list of insurable lives a large proportion of mankind. The term 'good health' as here used is to be considered in its ordinary sense, and means that the applicant was free from any apparent, sensible disease, or symptons of disease, and that he was unconscious of any derangement of the functions by which health could be tested. Slight, infrequent, transient disturbances, not usually ending in serious consequences, may be consistent with the possession of good health, as that term is ordinarily employed."

Gentlemen, the burden of proof in this case rests upon the insurance company. In its answer it admits the plaintiffs' cause of action, providing the policies are valid and subsisting obligations, and pleads certain facts as showing that the policies are not valid and subsisting obligations. It is bound to establish the defense which it has interposed by a preponderance of the evidence. It is
590 bound to show, first that Mr. Roloson, either at the time the application was made or the policy delivered, or at some time previous thereto, was afflicted with a disease, or with sickness, and that such disease or sickness actually contributed to his death. It is bound to establish both those facts by a preponderance of the evidence. You cannot resort to mere speculation or conjecture upon either of those matters. You are bound to be guided by the evidence and the circumstances adduced before you, and such inferences as you are reasonably able to draw—may be drawn from that evidence and those circumstances. If in the course of this charge I shall express my opinion upon either of those subjects, it is not binding upon you. Any such expression of opinion, or comment upon my part, you may accept if you think best, or you may reject if you think best. It is for you gentlemen and you alone to pass upon all questions of fact and upon the credibility of the witnesses.

In judging of the credibility of the witnesses you will take to your jury room all that good practical sense which you have acquired in the actual experience of life. You will consider their candor or lack of candor, the consistency of one part of their story with another part, and its consistency or inconsistency with other facts which you deem to be well established in the case, and you will consider the interest, if any, of the witness, and in the light of such considerations as these you will determine what weight you will attach to the testimony of the several witnesses. There is a considerable conflict in the evidence of the witnesses upon some branches of the case and it will be your duty to try to harmonize that conflict if you can; and if you cannot harmonize it, then it will be for you to determine which witness you will believe and which you will disbelieve. An important matter to aid you in determining the weight which you will attach to the evidence of the several witnesses is this: what was their opportunity to know in respect of the facts as to which they speak? This is of especial importance as to the evidence as to Mr. Roloson's health. Some witnesses have come before you and testified

that at certain times when they saw him he was sick, that he
591 coughed and that he looked emaciated, and all those matters which you will remember they testified to. Other witnesses have come before you and testified that he seemed to be in as good health as he ever was. Now gentlemen, it would be possible that the conflict between the testimony of these several witnesses would be explainable upon the ground that some of the witnesses saw him only once or twice at particular times when he was sick. If that were the basis of their testimony then that feature should be taken into consideration by you. It is seldom indeed that in any man's life who has reached the period to which Mr. Roloson had attained that there would not be some time when he would look sick, and possibly look emaciated, or cough, and if a witness were to see him at that time, or at those particular times and those alone, and if his sickness were only for a short period, then the impression and judgment which that witness might get from his observation would not be an actual criterion as to Mr. Roloson's permanent and abiding health or sickness.

And so in determining the weight of the testimony of the several witnesses upon this subject it is well for you to have carefully in mind the number of the observations which the witnesses made, the periods over which it extended, and in the light of such considerations, as well as all the other facts and circumstances in the case you will decide what weight you will attach to the testimony of the several witnesses on this subject.

The gentlemen, part of the evidence in this case relates to declarations made by Mr. Roloson himself as to the condition of his health. If those statements by Mr. Roloson represent his calm and deliberate judgment and opinion as to his health, then they would be entitled to great weight in passing upon the question as to whether he was sick and diseased or not. But if they were uttered as the result of despondency brought on by temporary sickness or grief, then they would not be entitled I should say to the same weight in your consideration. It is for you of course, gentlemen, to pass upon that subject, and not for me, but I think it is proper for me to call
592 your attention to these matters, because the evidence showed that during this period which we hav- been investigating, during at least a part of it, Mr. Roloson was suffering from a great grief, owing to the loss of his wife. It is a matter of common experience that a mind suffering from such an affliction does not view the affairs of life, or life itself, as men view it under ordinary circumstances, and that he may give utterance to expressions as to his health or his prospects in life which are merely the expression of his despondency, or his fear, and not the deliberate expression of his actual opinion or judgment, and it is proper for you to consider these matters in determining what weight you will attach to the evidence as to Mr. Roloson's declarations as to his health and sickness.

You should also bear in mind in weighing the evidence as to those declarations the difficulty which we all experience in accurately remembering and reporting the exact words used by another, especially after a considerable lapse of time.

It is a matter of common knowledge and common experience that the evidence of men as to the statement made by others is not likely to so accurately transcribe those statements as the testimony of men as to what they saw in actual occurrence with their eyes, and this is a circumstance which you may properly take into consideration in weighing these declarations.

Gentlemen, I charge you that the physicians who made these examinations of Mr. Roloson were the agents of the insurance company. The law required an insurance company to appoint a physician to make such examination before issuing the policy. Mr. Roloson had nothing to do with selecting those physicians. They were the agents of the company.

Your verdict, in case you find for the defendant will be:

We the jury find for the defendant.

In case you find for the plaintiff you may find in favor of the plaintiffs as to both policies, or as to one policy, and your verdict should correspond with your actual finding. If you find in favor of the plaintiffs as to both policies then your verdict should be:

593 We the jury find for the plaintiffs and assess their damages at $—— and the sum that you would fill in there would be Ten Thousand Dollars, with interest at six per cent. from the 15th day of June, 1903.

In case you find in favor of the plaintiffs as to one policy, and not as to the other, then you should find:

We the jury find for the plaintiff as to the first (or second) cause of action, as the case may be, and assess their damages at the sum of Five Thousand Dollars and interest at six per cent. from the 15th day of June, 1903.

You yourselves should compute the interest and include it in your assessment of damages, in case you find for the plaintiffs.

The policies, gentlemen, are set up in the complaint in the order of their date; the first cause of action relates to the first policy that was issued, and the second cause of action to the second policy.

Gentlemen, I think this is all that is necessary to guide you in the decision of this cause. There are two matters that are equally out of place in a court of justice, viz: prejudice and sympathy. These litigants come before us asking at our hands judgment according to the evidence and the law. The evidence and the law are the only things that can properly find any place in your verdict. If you should give yourselves over either to prejudice or sympathy you will then be misled and confused. But if you confine yourselves exclusively to the evidence as given by the witnesses and the law as given you by the Court I believe that your way will be plain. It will at least be as plain as it is possible to be made under the law and the evidence and the administration of justice.

Any exception you may enter will be reserved to each of the parties as to, all requests which they preferred and which have not been given by the Court; as to each of those requests a separate exception will be reserved. If there are any other exceptions to the charge of the court they should be taken at this time.

594 Defendant excepted to that part of the charge of the Court wherein the Court stated that the statute of Missouri should be so construed to read that no misrepresentations or false warranties shall be deemed material, unless the matter to which the misrepresentation or false warranty relates shall have actually contributed to the death of the insured, which portion of the charge was as follows, viz:

"I will read it to you with slight modifications, so as to give it a direct application to the present case:

No misrepresentation or false warranty made in obtaining a policy of insurance on the life of any person, a citizen of this state, shall be deemed material, or render the policy void unless the matter to which such misrepresentation or false warranty relates shall have actually contributed to the death of the insured."

Also to that part of the charge wherein the Court stated that this statute being the law of this state it became a part of the policy just as fully as if that section had been incorporated in the policy, should be construed as if that statute had been incorporated among its provision, and as if the policy read: "No misrepresentation or false warranty made in obtaining this policy of insurance shall be deemed material, or render the policy void, unless the matter to which such misrepresentation or false warranty relates shall actually contribute to the death of Mr. Roloson;" which portion of the charge was as follows, viz:

"That statute was in force at the time these policies were applied for and at the time they were issued. It was the law of this state. Being the law of the state, it became a part, both of the policies and the applications, just as fully as if that statute had been expressly incorporated in the policy or application; and the policy should be construed by you and given effect in this case just as if that language had been incorporated among its provisions, and as if the policy read: No misrepresentation or false warranty made in obtaining this policy of insurance shall be deemed material, or render the policy void, unless the matter to which such misrepresentation or false warranty relates shall actually contribute to the death of Mr. Roloson."

Also to that part of the charge wherein the Court stated that in order to sustain the defendant's contention in this case you must find first that Roloson was or had been afflicted previous to

595 the making of the application by some sickness or disease; second, that his answer as to such sickness or disease in the application was untrue or incomplete, and that such sickness or disease did actually contribute to his death, which portion of the charge was as follows, viz:

"In order to sustain the defense made by the insurance companies as to Mr. Roloson's representations and warranties in the written applications, you must find, first, that Roloson was, or had been, afflicted by some sickness or disease; second, that his answer as to such sickness or disease was untrue or incomplete; third, that such sickness or disease actually contributed to Mr. Roloson's death."

Also to that part of the charge wherein the Court defined good health, which portion of the charge was as follows, viz:

"The term 'good health' is used in this provision of the policy, and it is used in the written application. What does it mean? I will read to you an accurate definition of it. 'The term 'good health' does not import a perfect physical condition. It would not be reasonable to interpret it as meaning absolute exemption from all bodily infirmities, or from all tendencies to disease. It cannot mean that a man has not in him the seeds of some disorder. As has been well remarked by some of the law writers, such an interpretation would exclude from the list of insurable lives a large proportion of mankind. The term 'good health' as here used is to be considered in its ordinary sense, and means that the applicant was free from any apparent, sensible disease, or symptoms of diseaase, and that he was unconscious of any derangement of the functions by which health could be tested. Slight, infrequent, transient disturbances, not usually ending in serious consequences, may be consistent with the possession of good health, as that term is ordinarily employed."

Also to that part of the Court's charge wherein the Court stated: If you find that at the time either policy was delivered and accepted he was not in good health and that the sickness or disease which he was suffering from contributed to his death then the policy never took effect, and your verdict must be for defendant; but if
596 (and this is the portion to which defendant particularly excepted) you find that he was not in good health, but the sickness or disease from which he was suffering did not contribute to his death, then the fact of his sickness or disease at the time of the issuance of the policy was wholly immaterial, and so far as that provision is concerned you will find for the plaintiff, which portuon of the charge was as follows:

"I now desire to call your attention to a provision of the policy. It is the first provision on the back of the policy. It reads as follows: 'This policy shall not be in force until the first premium is paid, and the policy delivered to and accepted by the insured while in good health. Now, if you find that at the time either of these policies were delivered to Mr. Roloson and accepted by him that he was not in good health, and that the sickness or disease from which he was suffering actually contributed to his death, then the policies never took effect, and it would be your duty to find in favor of the defendant. But if you find that he was well, or in good health at the time the policies was delivered, or, in case he was not in good health, that the sickness or disease from which he was suffering did not actually contribute to cause his death, then the fact of his sickness or disease would be wholly immaterial, and so far as this provision of the policy is concerned it would still be your futy to find in favor of the plaintiffs."

Also to that part of the charge where the Court instructed the jury that the defendant, in order to maintain its defense in this case, was bound to show that Roloson, either at the time the application was made or the policy delivered, or previously, was afflicted with some disease or sickness, and that such disease or sickness actually contri-

buted to his death, and that defendant is bound to establish both those facts by a preponderance of the evidence, which portion of the charge was as follows, viz:

"It is bound to show, first that Mr. Roloson, either at the time the application was made or the policy delivered, or at some time previous thereto, was afflicted with a disease, or with sickness, and that such disease or sickness actually contributed to his death. It is bound to establish both those facts by a preponderance of the evidence."

597 Also to that part of the Court's charge wherein the Court suggested to the jury that if the declarations of Roloson as to his health were made while he was in a despondent condition, or suffering from grief, they would not be entitled to so much consideration as if made under other circumstances, which portion of the charge was as follows, to-wit:

"The gentlemen, part of the evidence in this case relates to declarations made by Mr. Roloson himself as to the condition of his health. If those statements by Mr. Roloson represent his calm and deliberate judgment and opinion as to his health, then they would be entitled to great weight in passing upon the question as to whether he was sick and diseased or not. But if they were uttered as the result of despondency brought on by temporary sickness or grief, then they would not be entitled I should say to the same weight in your consideration."

Also to the use in that connection by the Court of these words, in substance: "It is a matter of common experience that a man laboring under great despondency or grief is apt to give expression to his despondency, etc.,—the exact words being:

"It is a matter of common experience that a mind suffering from such an affliction does not view the affairs of life, or life itself, as men view it under ordinary circumstances, and that he may give utterance to expressions as to his health or his prospects in life which are merely the expressions of his despondency, or his fear, and not the deliberate expression of his actual opinion or judgment, and it is proper for you to consider these matters in determining what weight you will attach to the evidence as to Mr. Roloson's declarations as to his health and sickness."

Also to that part of the charge wherein the Court instructed the jury that the physicians who made these examinations were the agents of the insurance company, and that the insured had nothing to do with their selection and appointment, which portion of the charge was as follows, viz:

"Gentlemen, I charge you that the physicians who made
598 these Examinations of Mr. Roloson were the agents of the insurance company. The law required an insurance company to appoint a physician to make such examination before issuing the policy. Mr. Roloson had nothing to do with selecting those physicians. They were the agents of the Company."

The COURT: An exception will be reserved as to each of those matters.

Mr. RANDOLPH: We have no exception to note to the charge of the Court except as reserved by the Court.

Afterwards, on the 25th of April, 1905, the defendant by leave of the Court filed its motion for a new trial, which said motion is in words and figures as follows:

In the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division.

PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eber B. Roloson, Late of De Kalb County, Missouri, Deceased, Plaintiffs,

vs.

NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

Now comes the defendant and moves the court to set aside the verdict of the jury heretofore rendered herein and to grant it a new trial herein for the following reasons:

1st. Said verdict was not sustained by sufficient evidence.

2nd. Said verdict was contrary to law.

3rd. The court erred in refusing to instruct the jury to render a verdict for the defendant.

4th. The court erred in refusing each of defendant's special charges, numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21, and in refusing to give each of said special charges separately.

5th. The court erred in certain particulars in its general charge, excepted to by the defendant at the time.

6th. The court erred in ruling that Section 7890 of the Missouri Statute was applicable to the facts involved in this case.

7th. The court erred in refusing to hold said Section 7890 of the Missouri statute unconstitutional and void and in conflict with Section 1. of the 14th amendment to the Constitution of the United States as applied to the facts in this case.

8th. The court erred in holding and instructing the jury
599 that "no misrepresentation or false warranty made in obtaining this policy of insurance shall be deemed material, or render the policy void, unless the matter to which such misrepresentation or false warranty relates shall actually contribute to the death of Mr. Roloson."

9. The court erred in instructing the jury that "in order to sustain the defense made by the insurance companies as to Mr. Roloson's representations and warranties in the written applications, you must find, first, that Roloson was or had been, afflicted by some sickness or disease; second, that his answer as to such sickness or disease was untrue or incomplete; third, that such sickness or disease actually contributed to Mr. Roloson's death."

10th. The court erred in instructing the jury as follows: "I now desire to call your attention to a provision of the policy. It is the first provision on the back of the policy. It reads as follows: "This policy shall not be in force until the first premium is paid, and the policy delivered to and accepted by the insured while in good health. Now, if you find that at the time either of these policies was delivered to

Mr. Roloson and accepted by him that he was not in good health, and that the sickness or disease from which he was suffering actually contributed to his death, then the policies never took effect, and it would be your duty to find in favor of the defendant. But if you find that he was well, or in good health at the time the policies were delivered, or, in case he was not in good health, that the sickness or disease from which he was suffering did not actually contribute to cause his death, then the fact of his sickness or disease would be wholly immaterial, and so far as this provision of the policy is concerned it would still be your duty to find in favor of the plaintiff."

11th. The court erred in instructing the jury as follows: "It is bound to show, first that Mr. Roloson, either at the time the application was made or the policy delivered, or at some time previous thereto, was afflicted with a disease, or with sickness, and that such disease or sickness actually contributed to his death. It is bound to establish both those facts by preponderance of the evidence."

12th. The court erred in certain particulars of its general
600 charge excepted to by the defendant at the time of the trial.

13. The verdict of the jury is contrary to law and against the weight of evidence.

14th. There were other errors of law appearing upon the trial prejudicial to the defendant, duly excepted to by the defendant.

W. A. KERR,
S. S. BROWN &
J. E. DOLMAN,
Attorneys for Defendant.

And afterwards to-wit, on the said 25th day of April, 1905, the Court made an order overruling the motion for a new trial, in words and figures as follows:

PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eber B. Roloson, Late of De Kalb County, Missouri, Deceased, Plaintiffs,

vs.

NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

This cause coming duly before the Court for hearing upon motion of defendant for a new trial thereof for reasons set forth in said motion, and the court being fully advised in the premises, overrules said motion, to which ruling of the court defendant by its attorney duly excepts.

CHARLES F. AMIDON, *Judge.*

And afterwards to-wit, on the said 25th day of April, 1905, the Court made an order extending the time for filing Bill of Exceptions herein in words and figures as follows:

PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eber B. Roloson, Late of De Kalb County, Missouri, Deceased, Plaintiffs,

vs.

NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

Upon reading the annexed Petition,

It is ordered, that the time for preparing and filing a Bill of Exceptions in the above entitled matter, be, and the same hereby is extended until the 29th day of April, 1905, and

601 It is further ordered, that on or before said day, the Bill of Exceptions may be duly allowed and filed, in all things with the same force and effect as if done within the time heretofore fixed and allowed by the Court.

Dated April 25th, 1905.

CHARLES F. AMIDON, *Judge.*

Which said "annexed petition," is in words and figures as follows:

PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eber B. Roloson, Deceased, Late of De Kalb County, Missouri, Plaintiffs,

vs.

NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

Now comes the above named defendant and petitions the Court for an extention of the time wherein to make and file its Bill of Exceptions herein, and as ground therefor, shows:

That immediately upon the rendition of the verdict in said case, defendant requested the official stenographer of the Court in which said cause was tried, to immediately prepare for it a transcript of the evidence, and copy of exhibits. The defendant has used due diligence to prepare its transcript of evidence and bill of exceptions and copies of exhibits herein; and that it has been impossible to have said bill of exceptions prepared and signed and filed within the time heretofore fixed and allowed.

Wherefore, defendant prays that it may have, to-wit, until the first day of May, 1905, to file its bill of exceptions herein, and that on or before said date, the bill of exceptions may be duly signed and allowed and filed, in all things with the same force and effect as if the same had been done within the time heretofore fixed and given by the Court.

Dated April 24th, 1905.

W. A. KERR &
S. S. BROWN,
Attorneys for Defendant.

And with said petition for an extension of time in which to file Bill of Exceptions there was presented to the Court a stipulation by and between the Attorneys for the defendant and the plaintiffs herein in words and figures as follows:

602 PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eben B. Roloson, Deceased, Plaintiff,
vs.
THE NORTH WESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

It is stipulated by and between said parties that the Bill of Exceptions in said cause may be filed at any time within the week ending Saturday, April 29th, 1905, as of April 26, 1905; and that an order may be entered, if desired by defendant, extending the time of filing said bill of Exceptions to that date.

Dated April 24th, 1905.

W. H. HAYNES,
K. B. RANDOLPH,
Of Counsel for Plaintiffs.

And afterwards, to-wit, on the said 25th day of April, the following order was made and entered of record.

And now comes the defendant and presents to the Judge of said Court this its bill of exceptions, and ask that the same be signed, sealed and made part of the record in this cause, which is accordingly done, this April 25th, 1905.

CHARLES F. AMIDON.

O. K. April 24th, 1905.

W. H. HAYNES,
K. B. RANDOLPH,
Attorney- for Pl'ff-.

And afterwards, to-wit, on the 5th day of May A. D., 1905, the defendant herein filed in the office of the Clerk of the Circuit within and for the St. Joseph Division of the Western District of Missouri a petition for a Writ of Error, which said writ of error is in words and figures as follows:

In the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division.

PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eber B. Roloson, Late of De Kalb County, Missouri, Deceased, Plaintiffs,
vs.
THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

Petition for Writ of Error.

603 The Northwestern National Life Insurance Company, defendant in the above entitled cause, feeling itself aggrieved by the judgment hereinbefore entered, comes now and petitions

said Court for an order allowing said defendant to prosecute writ of error to the honorable, the Supreme Court of the United States of America, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which said defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the said, the Honorable Supreme Court of the United States, and for such other orders and process as may cause the aforesaid judgment to be duly reviewed and corrected, if error be found in the record.

And your petitioners will ever pray.

Dated May 8, 1905.

NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY,

By W. A. KERR,
S. S. BROWN AND
J. E. DOLMAN,
Attorneys for Defendant.

Allowed,
CHARLES F. AMIDON, *Judge.*

And on the said 5th day a Writ of Error was issued out of the Clerk's office for the said St. Joseph Division of the Western District of Missouri, which is herewith returned:

604 In the Circuit Court of the United States, for the Western District of Missouri, St. Joseph Division.

PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eber B. Roloson, Late of De Kalb County, Missouri, Deceased, Plaintiffs,

vs.

THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

Petition for Writ of Error.

The Northwestern National Life Insurance Company, defendant in the above entitled cause, feeling itself aggrieved by the judgment hereinbefore entered, comes now and petitions said Court for an order allowing said defendant to prosecute writ of error to the honorable, the Supreme Court of the United States of America, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which said defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the said, the Honorable Supreme Court of the

United States, and for such other orders and process as may cause the aforesaid judgment to be duly reviewed and corrected, if error be found in the record.

And your petitioner will ever pray.

Dated May 8, 1905.

NORTHWESTERN NATIONAL LIFE INSURANCE CO.,
By W. A. KERR,
S. S. BROWN AND
J. E. DOLMAN,
Attorneys for Defendant.

Allowed
CHARLES F. AMIDON, *Judge.*

605 The President of the United States of America, To the Honorable Judges of the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri—Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, at the March Term, 1905, thereof, between Paul Riggs and Eugene De Hart, executors of the estate of Eber B. Roloson, deceased, plaintiff, and The Northwestern National Life Insurance Company, defendant, a manifest error hath happened, to the great damage of the said The Northwestern National Life Insurance Company, defendant, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court, on or before the eighth day of June, 1905, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what or right, and according to the laws and customs of the United States, should be done.

Witness, The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court.

Issued at office in St. Joseph, this 5th day of May, in the year of our Lord one thousand nine hundred and five.

[Seal U. S. Circuit Court, St. Joseph Div., Western Dist. Mo.]

C. C. COLT, *Clerk.*
By ——— ———, *D. C.*

Allowed by
CHARLES F. AMIDON, *Judge.*

605½ UNITED STATES OF AMERICA,
St. Joseph Division of the
Western District of Missouri, Set:

In obedience to the command of the within Writ, I herewith transmit to the United States Supreme Court, a duly certified transcript of the record and proceedings in the within entitled case, and with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri.

Issued at office in St. Joseph, this 1st day of June, A. D. 1905.

[Seal U. S. Circuit Court, St. Joseph Div., Western Dist. Mo.]

C. C. COLT, *Clerk.*
By —— ——, *D. C.*

[Endorsed:] No. 318. United States Circuit Court. Western District of Missouri. St. Joseph Division. Paul Riggs and Eugene De Hart, executors of the estate of Eber B. Roloson, deceased, *vs.* The Northwestern National Life Insurance Co. Writ of Error. Filed May 12th, 1905. C. C. Colt, Clerk.

[Endorsed:] State of Missouri County of ——. Circuit Court Paul Riggs *et al.* Plaintiffs, *vs.* N. W. Nat. Life Ins. Co., Defendant. Petition for Writ of Error. Due and personal service of the within —— admitted this — day of ——. —— ——, Attorneys for ——. Filed May 5th 1905. Calvin C. Colt, Clerk U. S. Cir. Court. Brown & Kerr 708 Andrus Building Minneapolis, Minnesota.

606 And afterwards to-wit on the said 5th day of May, A. D. 1905, there was filed in the office of the Clerk of the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri the Assignment of Errors in the foregoing cause, in words and figures as follows:

In the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division.

PAUL RIGGS and EUGENE DE HART, Executors of the Last Will and Testament of Eber B. Roloson, Late of De Kalb County, Missouri, Deceased, Plaintiffs,

vs.

THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Defendant.

Assignment of Error.

Comes now the above named defendant and assigns error in the trial of said cause and the judgment and decision of the said Circuit Court therein in the following particulars, that is to say:

I.

The Court erred in the rejection of evidence offered by defendant and in the admission of evidence offered by plaintiffs upon the said trial in the following instances and particulars, to wit:

1. In rejecting and excluding from the testimony of W. F. Bechtel all the answer of the said Bechtel to interrogatory number 5,
607 which testimony so requested is in words and figures following:

"The company has never, since I have been connected with it, issued policies, except upon such applications and examinations and reports. The making of them is and always has been a condition precedent to the issuing of the policy. They are all necessary to enable the insurer to determine whether or not it wants to insure the life of the applicant. And unless the application, medical examination and report show the applicant in good health and insurable condition, and free from diseases and a good risk, the policy is never issued. And we would not at any time have issued a policy except upon a good risk, and on one whose application and medical examination and report showed to be a good risk and in good health, and free from disease."

2. In rejecting and excluding from the testimony of said Bechtel in his said deposition all that part of his answer to interrogatory 6 in words and figures following:

"The statements contained in the application and the warranties and agreements therein contained were the basis of and the consideration for the issuance of the policy. But for them and each of them each policy would not in either case have been issued. When the application came in, the defendant believed the statements, warranties and representations therein contained, and each of them, to be true and issued the policy in each case in consideration thereof, and in reliance thereon, and because thereof, and because it believed them to be true, and would not otherwise have accepted the application or issued the policy. The policy would never have been issued if the application had shown, or if we had known, that the insured was suffering from any disease or ailment, or was not in perfect physical condition. This is true in each case. We also depend upon the medical examination in this way,—if the application proper shows the insured free from any disease and a good
608 risk we then consider the report of the medical examiner and the medical examination, and see whether it corroborates the application. If the application shows the applicant to be non-insurable, or suffering from any disease or ailment, or with a bad family history, the application is rejected at once, without reference to a medical examination, but when the application shows a good risk upon its face, we consider the medical examination and report. We did in each of these cases, and would not in either case have taken the application alone, had it not been accompanied by a medical examination and examiner's report. If we had known any of the facts in this case, as they are set forth in our pleadings, or as they were set forth in the action to cancel the policies in equity we

would not have accepted either application. We would never have accepted an application which showed the applicant to have a bad family history, or to be in poor health, or to have or be suffering from disease of the lungs, heart or stomach, or pulmonary trouble, anæmia or hemorrhages, or any physical ailment, weakness or disorder. This would be so whatever the medical examination might be, nor would we have accepted the application if the application had, upon its face, shown the applicant to be a good risk, if the medical examination or report showed him to be a poor risk or to have any of these troubles or any disease, sickness, weakness, or ailment, or to have had such. This is and always has been true of both applications and policies. We relied, too, upon the other conditions and agreements of the applicant, including the agreement that the policy should not become effective until delivered to him and accepted by him while in good health. I did not know, nor did the defendant know that any of the breaches of warranty or misrepresentation or concealment, in connection with either of these policies, or that Roloson had a bad family history, or that there was any misrepresentation, fraud or concealment, either in the application or the medical examination or report, or that he was not at all times a perfect risk and in perfect health, until after his death and the appointment of his executors."

609 3. In rejecting and excluding from the testimony of Dr. J. W. Baker as given in his deposition the following questions and answers:

"A. He did, yes sir.

Q. And did he receive One Thousand Dollars ($1,000.00)?

A. No sir, he did not.

Q. What amount did he receive?

A. He received Five Hundred Dollars ($500.00).

Q. He received Five Hundred Dollars ($500.00)?

A. Yes sir."

4. In refusing upon the objection of plaintiffs to permit defendant to prove by the witness Austin Craig the general conversation among the people of Weatherby respecting the health and appearance of Eber B. Roloson.

5. In permitting the plaintiffs in the examination of the witness John Redmond to assume in a direct question to said Redmond that the said Eber B. Roloson had met with losses just before he died.

6. In refusing to permit the defendant to prove by the witness George Price that he was acquainted with the physical appearance of consumptives and how those physical conditions compared with the physical conditions *compared with the physical conditions* of Eber B. Roloson.

7. In refusing to permit the defendant to prove by the witness Dr. Isaacs that he did not regard Eber B. Roloson as a first class risk for life insurance at the time he examined him.

8. In rejecting and excluding at the instance of plaintiff the letter written by G. W. Isaacs, M. D., addressed to State Life Insurance Co., Indianapolis, Indiana, dated March 27th, 1901, which is in words and figures as follows:

"WEATHERBY, Mo., *March* 27, 1901.

To State Life Ins. Co., Indianapolis, Ind.

610 GENTLEMEN: I thought I would write you a few lines in regard to the examination of Mr. Eber Roloson of this place for Ins. in your Company and request you to appoint another physician to assist me in re-examining him. I am not satisfied as to his fitness for Ins., 'especially' in the amount asked for and on account of his age, the slight rise in temperature at my last examination and an 'apparent' change in his general appearance since my first examination prompts me to ask you for assistance in re-examining him before 'finally' passing on his case.

There is but one other physician here (Dr. Lee) but any other you see fit to appoint will be agreeable to me. Hoping to hear from you, I remain,

Yours truly, G. W. ISAACS, M. D."

9. In rejecting and excluding at the instance of plaintiffs the letter offered in evidence by defendant, signed by G. W. Isaacs, M. D., addressed to Allison Maxwell, M. D., at Indianapolis, Indiana, and dated April 18th, 1901, which is in words and figures following:

WEATHERBY, Mo., *April 18th*. 1901.

Allison Maxwell, M. D., Indianapolis, Ind.

DEAR DOCTOR: Replying to yours of March 29th, concerning examination of E. B. Roloson will say that I have re-examined him, and find his pulse and temperature normal, but I think it best to postpone this case indefinitely. I have arrived at this conclusion after a thorough consideration of his case. While he is in good physical condition for a man of his age, there are other things I have taken into consideration in passing on his case. I
611 trust you will consider this confidential as I do not want to make him an enemy.

Yours truly, G. W. ISAACS, M. D."

10. In rejecting and excluding at the instance of plaintiffs the testimony of Dr. Isaacs offered by defendant to the effect that the plaintiff De Hart told the said witness that he (De Hart) would like to see Mr. Roloson obtain the insurance from the State Life Insurance Company of Indiana as a friend, and in striking out from the evidence of the said Isaacs his statement to that effect.

11. In sustaining the objection of plaintiffs to and refusing to permit the witness Isaacs to testify in answer to a question asked by defendant's counsel as follows: "What was the nature of your communication to the company in respect to Mr. Roloson as a risk, favorable or adverse?"

12. In rejecting and excluding the deposition of Paul S. Knowles offered in evidence by defendant, wherein the said Knowles testified in substance that he had been connected with the State Life Insurance Company of Indianapolis for about seven years; that the ap-

on to that company by Eber B. Roloson for insurance set
in the evidence was received and accepted by the medical de-
ent of said Company February 26th, 1901, the policy written
ot delivered, and was finally declined April 20th, 1901, after
pondence with Dr. Isaacs.

In rejecting and excluding at the instance of plaintiffs the
deposition of Harvey R. Ellsworth offered by defendant, in
deposition said Ellsworth testified that the application of
B. Roloson to the State Life Insurance Company of Indianapo-
ove mentioned was rejected.

In rejecting and excluding at the instance of Plaintiffs the
ls of the Probate Court of De Kalb County, Missouri, properly
nticated, stating and showing that the entire estate of Eber B.
Roloson, deceased, was valued in said court at $13,584.14
exclusive of insurance on his life taken out after the first of
the year 1901, and that his liabilities allowed in said court
nted to $22,870.66.

In excluding and rejecting at the instance of plaintiffs the
f Eber B. Roloson offered in evidence by defendant, which
s in words and figures following:

Eber B. Roloson, residing at the town of Weatherby, County
Kalb State of Missouri, being of sound mind and disposing
ory, do make this my last will and testament.

) I want all of my debts paid without Probating, a list of which
I leave with my brother Howard J. Roloson.

) I give devise and bequeath to my beloved Brother Cassius N.
son Two Thousand Dollars also Two Hundred Dollars to be
to him annually as long as he lives the annual payment to begin
ght months after my death. I also bequeath to his daugh-
Ermie Roloson One Thousand Dollars, her father C. N. Roloson
ve the use of it as long as he lives at the death of Cassius N.
son the Two Thousand Dollars is to be equally divided between
daughters Maud and Ermie Roloson and if either one of the
hters die without Issue both the legacies will go to the other
hter and if both daughter Maud and Ermie die without bodily
, that is without issue both of the above legacies are to revert
to my estate all the bond that shall be required to the fullfill-
of the above conditions is for Cassius N. and his wife Alice Rolo-
to sign it.

3) I give and bequeath two Thousand Dollars in trust to be in-
d as he sees to their benefit to my beloved Brother Howard J.
son for the benefit of my deceas- Sister Mary Dell Taylor's
hters Anna & Allie Taylor I empo-er my brother Howard J.
son to use discretion for the sole benefit of the two daughters
a & Allie Taylor and to be turned over to them divided equally
and if one daughter dies the other daughterwill get the other's
share or if both die without bodily heirs that is without Issue
it shall revert to my estate all the bond that is required for
fullfillment of the above conditions is for Howard J. and his
Georgeanna Roloson to sign it.

(4) I give and bequeath to my beloved Brother Howard J. Roloson two Thousand Dollars to be used by him according to our agreement and when that agreement has been fullfilled the balance will go to him or his heirs the agreement is not to be attached to this will I give devise and bequeath to my Darling Daughter Lucy Mary Roloson all of the balance and Remainder of my Estate and Property both real and Personal and Mixed absolutely to be paid to her when she arrives at her majority, provided however that if she should die before or after her majority without bodily heirs that is without Issue what property that is left is to be divided as follows that the sum of one fifth of what is left to be equal-y divided share and share alike among John R. Tull, Anna Tull, Ella T. Riggs, Kate Toothaker
that the income of one fifth to be equal-y divided between Rose H. Brierton and Cora V. Alexander and at their death it goes to my Brothers and Sisters or if they are dead to their bodily heirs names of Brothers and Sisters to receive it are Sister Arabella Fielder Brothers Cassius N. Roloson, John H. Roloson and Howard J. Roloson
the above named Sister and Brothers or their bodily heirs are to receive the three fifth- at the Death of my Daughter as stated above names of Sister and Brothers to receive the three fifth- Arabella Fielder Cassius N. Roloson John H. Roloson and Howard J. Roloson

(6) I hereby appoint and constitute Paul Riggs and Eugene De Hart assisted by Howard J. Roloson the Executors of this my last will, and as I have the utmost confidence in their business integrity I empower them to invest or loan the surplus money as their judgment dictates.

(7) I hereby appoint Howard J. Roloson without bond but himself and wife Georgeanna Roloson assisted by Paul Riggs and Eugene De Hart as Guardeans of my daughter Lucy Mary
614 Roloson but my said Daughter shall choose her home and Residence and all legitimate Bills shall be paid for her maintenance

In witness whereof I, Eber B. Roloson have hereunto set my hand and affixed my seal at the town of Weatherby in County of De Kalb State of Missouri this the 27 day of Jan. 1903 and hereby publish and declare the same to be my last Will and Testament.

EBER B. ROLOSON. [SEAL.]

The said Eber B. Roloson at the town of Weatherby on said 27 day of January A. D. 1903 signed and sealed this instrument and Published and de*cal*red the same as and for his last Will and Testament, and we at his request and in his presence and in the presence of each other, have hereunto written our names a subscribing witnesses.

JOHN W. RIGGS, JR.
HENRY R. HARPER."

16. In refusing to permit the defendant to prove by the witness Dr. Isaacs that early in the spring of 1901 Eber B. Roloson made

application to the State Life Insurance Company of Indianapolis, Indiana, for a policy of $5,000.00 of insurance upon his life, and that said application was rejected because of the non-insurable condition of said Roloson, and that the said Roloson was long prior to the making of his application for the policy herein issued on and described in the first count of the petition and numbered 53965, advised of said rejection and the reasons therefor.

17. In refusing to strike out at the instance of defendant the statement of the witness Walcott that at the time of taking the application of Eber B. Roloson for policy number 53966, the said Roloson showed witness every one of the other insurance policies he had; that they were listed on said application and amounted to $24,500.

18. In permitting witness Clark Packard while testifying to refresh his mind by examining a bill of the commission firm that the cattle of Eber B. Roloson were said to have been shipped to.

615 19. In permitting the said witness Clark Packard against defendant's objection to state the value of cattle shipped by Eber B. Roloson by reference to the memorandum described in the last paragraph.

20. In permitting the witness Packard to testify against defendant's objection that he would have known it if Roloson had had any bunch of cattle on another farm.

21. In permitting the witness Packard against defendant's objection to testify as to the value of corn Eber B. Roloson had purchased.

22. In permitting witness Redmond to testify against defendant's objection as to the approximate time a certain bunch of cattle had been delivered to Roloson and the approximate number of cattle in said bunch.

23. In permitting the witness Joe Baker against the defendant's objection to testify as follows:

"Q. Would there be any material difference in what would be realized from cattle putting them on the Chicago market or on the St. Joseph market?

A. There is frequently—I buy cattle on a break and run them to Chicago, and have recently, and then again it looks like they would come from Chicago this way, but in an ordinary way, taking freight, I wouldn't judge there would be a great deal of difference.

Q. When you buy on a break here and ship to Chicago you simply gamble on the rise of the market—you could sell them here on the rise also?

A. Yes, sir, be the same.

Q. But you gain the time, is all?

A. Yes sir; We hold them out maybe ten days——"

And in refusing defendant's request to strike out said testimony after it had been given.

24. In permitting the witness Joe Baker against defend-

616 ant's objection to testify as follows:

"Q. Now Mr. Baker if you bought corn at 40 cents a bushel to feed steers from the time that Mr. Roloson purchased these steers until the 9th day of February of the following year, how much mar-

gin per pound or per hundred pounds would there have to be from him to come out even on the feeding?

"A. Well sir, I don't really believe he could have any money in it and send them out to market——

The COURT: In the Fall of 1902 we are speaking of.

"A. I am thinking of that too—I don't think he possibly, with 40 cent corn, and haul it, could have any money — it at 75 cents a hundred advance.

"Q. You mean they must sell at 5.50?

"A. Yes, and wouldn't be no money in it at that. We usually calculate $1.25 on the cattle to feed them, for a little profit.

"Q. You mean they must sell for that to come out even?

"A. To come out even. If there is any profit on it we count on $1.25."

25. In permitting the witness Clint Hull against the defendant's objection to testify as follows:

"Q. I will put it this way: Suppose the cattle were bought at 4.75, and upon being fed four months what price should they be sold at to come out even, so there would be no loss, if corn was 40 cents a bushel?

"A. I should judge around five dollars to five and a quarter.

"Q. You think they would come out even on 50 cents advance?

"A. No sir, I don't think they would.

"Q. Would 75 cents bring them out even?

"A. Well sir, I couldn't say; I judge somewheres around a dollar."

617 II.

The Court erred in refusing to charge the jury as requested by defendant in each of the following instances and particulars, that is to say:

1. In refusing to charge the jury at defendant's request as follows: "That the Missouri Statute Sec. 7890 is not applicable to this case, neither to the issues thereof nor the policies involved therein nor either of them."

2. In refusing to charge the jury at defendant's request as follows: "That said statute as applied to the facts in this case is unconstitutional and void and in conflict with Sec. 1. of the 14th amendment to the constitution of the United States."

3. In refusing to charge the jury at defendant's request as follows: "That plaintiffs cannot recover herein and that the verdict must be for defendant."

4. In refusing to charge the jury at defendant's request as follows: "That if the jury find from the evidence that any one of the warranties contained in the application for the policy sued on in the first cause of action be untrue, the verdict on the first cause of action must be for defendant."

5. In refusing to charge the jury at defendant's request as follows: "That if the jury find from the evidence that any one of the warranties contained in the application for the policy sued on in the second

cause of action be untrue, the verdict on said second cause of action must be for defendant."

6. In refusing to charge the jury at defendant's request as follows: "That if the jury find from the evidence that the policy mentioned in the first cause of action was not delivered to and accepted by the insured while he was in good health, then the verdict on the first count must be for the defendant."

618 7. In refusing to charge the jury at defendant's request as follows: "That if the jury find from the evidence that the policy mentioned in the second cause of action was not delivered to and accepted by the insured while he was in good health, then the verdict on the second count must be for the defendant."

8. In refusing to charge the jury at defendant's request as follows: "That the plaintiffs cannot recover on the first cause of action if the jury find from the evidence that at the time of his making the application for the policy therein sued upon Eber B. Roloson knowingly, falsely and fraudulently and with the purpose and intent to deceive and mislead defendant into accepting such application and issuing a policy thereon, misrepresented in said application any matter concerning his health, life or physical condition, which would naturally and reasonably affect the action of defendant in considering said application and accepting or rejecting the same, and in such case the Missouri Statute Section 7890 is not applicable, and if applied would be in violation of Section 1. of the 14th amendment of the constitution of the United States."

9. In refusing to charge the jury at defendant's request as follows: "That the plaintiffs cannot recover on the second cause of action if the jury find from the evidence that at the time of his making the application for the policy therein sued upon Eber B. Roloson knowingly, falsely and fraudulently and with the purpose and intent to deceive and mislead defendant into accepting such application and issuing a policy thereon, misrepresented in said application any matter concerning his health, life or physical condition, which would naturally and reasonably affect the action of defendant in considering said application and accepting or rejecting the same, and in such case the Missouri Statute Section 7890 is not applicable, and if applied would be in violation of Section 1. of the 14th amendment to the constitution of the United States."

10. In refusing to charge the jury at defendant's request 619 as follows: "Plaintiffs cannot recover on count #1 if the jury find from the evidence that prior to the time of making application for the policy therein sued on Eber B. Roloson had been to his own knowledge rejected by any insurance company or association to which he had previously made application for insurance, and if with the purpose and intention of concealing such fact from defendant he in such application falsely and fraudulently and intentionally and with the purpose of deceiving defendant and inducing it to accept such application, warranted to defendant that no such rejection had been made.

11. In refusing to charge the jury at defendant's request as follows: "Plaintiffs cannot recover on count #2 if the jury find from

the evidence that prior to the time of making application for the policy therein sued on Eber B. Roloson had been to his own knowledge rejected by any insurance company or association to which he had previously made application for insurance, and if with the purpose and intention of concealing such fact from defendant he in such application falsely and fraudulently and intentionally and with the purpose of deceiving defendant and inducing it to accepting such application, warranted to defendant that no such rejection had been made.

12. In refusing to charge the jury at defendant's request as follows: "Plaintiffs cannot recover upon a policy if the jury find from the evidence that in his written application therefor Roloson knowingly, falsely and fraudulently and with intention to deceive and mislead defendant made therein any untrue warranty or representation to defendant concerning any matter then material to the risk of insuring his life."

13. In refusing to charge the jury at defendant's request as follows: "Plaintiffs cannot recover upon a policy if the jury find from the evidence that at the time of making written application therefor Roloson was afflicted with any ailment, disease, sickness,
620 weakness or disorder which would naturally and reasonably tend to shorten his life."

14. In refusing to charge the jury at defendant's request as follows: "Plaintiffs cannot recover upon a policy if the jury find from the evidence that at the time of making written application therefor Roloson knowingly and with intent to deceive and mislead defendant into accepting said application and issue a policy thereon, concealed from defendant any material fact about his life, health or physical condition, which would naturally and reasonably tend to shorten his life."

15. In refusing to charge the jury at defendant's request as follows: "The plaintiffs cannot recover upon a policy if the jury find from the evidence that at the time of making written application therefor Roloson willfully and intentionally in such application neglected to answer fully, truthfully and completely every question therein asked and answered concerning his health, life and physical condition."

16. In refusing to charge the jury at defendant's request as follows: "The plaintiffs cannot recover upon a policy if the jury find from the evidence that at the time of making written application therefor said Roloson was afflicted with any ailment, sickness, weakness, disease or disorder which in any way or to any extent contributed to shorten his life."

17. In refusing to charge the jury at defendant's request as follows: "Plaintiffs cannot recover upon either policy if the jury find from the evidence that at the time of making written application therefor Roloson was afflicted with any unusual physical or mental condition which did in any way or to any extent contribute to his death."

18. In refusing to charge the jury at defendant's request as follows: "The plaintiffs cannot recover upon either policy if the jury

find from the evidence that the final sickness or death of Roloson was in any way caused or contributed to by any sickness, disease, weakness or disorder existing in Roloson at the time of mak-
621 ing the application for such policy."

19. In refusing to charge the jury at defendant's request as follows: "The plaintiffs cannot recover upon any policy if the jury find from the evidence that Roloson's life was shortened by any mental or physical condition existing at the time he made written application for such policy and which was not disclosed to defendant in the application for the policy."

20. In refusing to charge the jury at defendant's request as follows: "But the jury must find for the defendant on the first count of the petition if they believe from the evidence that at the time of making the application for the policy therein sued on Eber B. Roloson was in bad health and knew said fact, and that he knowingly, falsely and fraudulently and with the purpose and intent to deceive and mislead defendant into accepting said application and issuing a policy thereon made the statement in said application that he was then and had been for twelve months in good health, and free from all ailments, diseases, weaknesses and infirmities, and that the defendant was deceived thereby and issued said policy when it would not otherwise have done so, whether any disease, weakness or infirmity he then had contributed to his death or not; and in such case Section 7890 of the Revised Statutes of Missouri, 1899, is not applicable, and if applied would be in violation of Section 1 of the 14th amendment to the Constitution of the United States."

21. In refusing to charge the jury at defendant's request as follows: "That the jury must find for the defendant on the second count of the petition if they believe from the evidence that at the time of making the application for the policy therein sued on Eber B. Roloson was in bad health and knew said fact, and that he knowingly, falsely and fraudulently and with the purpose and intent to deceive and mislead defendant into accepting said application and issuing a policy thereon made the statement in said ap-
622 plication that he was then and had been for twelve months in good health, and free from all ailments, diseases, weaknesses and infirmities, and that the defendant was deceived thereby and issued said policy when it would not otherwise have done so, whether any disease, weakness or infirmity he then had contributed to his death or not; and in such case Section 7890 of the Revised Statutes of Missouri, 1899, is not applicable, and if applied would be in violation of Section 1 of the 14th amendment to the constitution of the United States."

III.

The court erred in charging the jury in each of the following particulars:

1. In using in its charge to the jury the following language: "I will read it to you with slight modifications, so as to give it a direct application to the present case:

No misrepresentation or false warranty made in obtaining a policy of insurance on the life of any person, a citizen of this state, shall be deemed material, or render the policy void, unless the matter to which such misrepresentation or false warranty relates shall have actually contributed to the death of the insured."

2. In using in its charge to the jury the following language; "That statute was in force at the time these policies were applied for and at the time they were issued. It was the law of this state. Being the law of this state, it became a part, both of the policies and the applications, just as truly as if that statute had been expressly incorporated in the policy or application; and the policy should be so constructed by you and given effect in this case just as if that language had been incorporated among its provisions, and as if the policy read: No misrepresentation or false warranty made in obtaining this policy of insurance shall be deemed material, or render the policy void, unless the matter to which such misrepresenta-
623 tion or false warranty relates shall actually contribute to the death of Mr. Roloson."

3. In using in its charge to the jury the following language: "In order to sustain the defense made by the insurance companies as to Mr. Roloson's representations and warranties in the written application, you must find, first, that Roloson was, or had been, afflicted by some sickness or disease; second, that his answer as to such sickness or disease was untrue or incomplete; third, that such sickness or disease actually contributed to Mr. Roloson's death."

4. In using in its charge to the jury the following language: "The term 'good health' is used in this provision of the policy, and it is used in the written application. What does it mean? I will read to you an accurate definition of it. 'The term 'good health' does not import a perfect physical condition. It would not be reasonable to interpret it as meaning absolute exemption from all bodily infirmities, or from all tendencies to disease. It cannot mean that a man has not in him the seeds of some disorder. As has been well remarked by some of the law writers, such an interpretation would exclude from the list of insurable lives a large proportion of mankind, the term 'good health' as here used is to be considered in its ordinary sense, and means that the applicant was free from any apparent, sensible disease, or symptoms of disease, and that he was unconscious of any derangement of the functions by which health could be tested. Slight, infrequent, transient disturbances, not usually ending in serious consequences, may be consistent with the possession of good health, as that term is ordinarily employed."

5. In using in its charge to the jury the following language: "I now desire to call your attention to a provision of the policy. It is the first provision on the back of the policy. It reads as follows: 'This policy shall not be in force until the first premium is paid, and the policy delivered to and accepted by the insured while in good health. Now, if you find that at the time either of these pol-
624 icies was delivered to Mr. Roloson and accepted by him that he was not in good health, and that the sickness or disease from which he was suffering actually contributed to his death, then

the policy never took effect, and it would be your duty to find in favor of the defendant. But if you find that he was well, or in good health at the time the policies were delivered, or, in case he was not in good health, that the sickness or disease from which he was suffering did not actually contribute to cause his death, then the fact of his sickness or disease would be wholly immaterial, and so far as this provision of the policy is concerned it would still be your duty to find in favor of the plaintiff-."

6. In using in its charge to the jury the following language: "It is bound to show, first that Mr. Roloson, either at the time the application was made or the policy delivered, or at some time previous thereto, was afflicted with a disease, or with sickness, and that such disease or sickness actually contributed to his death. It is bound to establish both these facts by a preponderance of the evidence."

7. In using in its charge to the jury the following language: "Then gentlemen, part of the evidence in this case relates to declarations made by Mr. Roloson himself as to the condition of his health. If these statements by Mr. Roloson represent- his calm and deliberate judgment and opinion as to his health, then they would be entitled to great weight in passing upon the question as to whether he was sick and diseased or not. But if they were uttered as the result of despondency brought on by temporary sickness or grief, then they would not be entitled I should say to the same weight in your consideration."

8. In using in its charge to the jury the following language: "It is a matter of common experience that a mind suffering from such an affliction does not view the affairs of life, or life itself, as men view it under ordinary circumstances,—and that he may give utterance to expressions as to his health or his prospects in life which are merely the expression of his despondency, or his fear, and not the deliberate expression of his actual opinion or judgment, and it is proper for you to consider these matters in determining what weight you will attach to the evidence as to Mr. Roloson's declarations as to his health and sickness."

9. In using in its charge to the jury the followng language: "Gentlemen, I charge you that the physicians who made these examinations of Mr. Roloson were the agents of the insurance company. The law required an insurance company to appoint a physician to make such examination before issuing the policy. Mr. Roloson had nothing to do with selecting those physicians. They were the agents of the company."

IV.

The court erred in overruling the motion for a new trial made by leave of court by defendant.

Wherefore the defendant prays that the judgment of the Circuit Court be reversed.

W. A. KERR.
STEPHEN S. BROWN.
J. E. DOLMAN.

626 UNITED STATES OF AMERICA, *Set:*

Know all men by these presidents, that we The Northwestern National Life Insurance Company and The American Surety Company of New York as surety are held and firmly bound unto Paul Riggs and Eugene De Hart, Executors of the estate of Eber B. Roloson, deceased, their Executors and Administrators, in the sum of Twenty Thousand dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seales, and dated this 4th day of May A. D. 1905.

Upon this express condition, to-wit: Whereas, the above named The Northwestern National Life Insurance Company has prosecuted its writ of error to the United States Supreme Court to reverse the judgment rendered in the cause above named by the United States Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri. Now if the above named The Northwestern National Life Insurance Company shall prosecute its writ of error to effect and answer all damages and costs, if it fail to make — its plea, then this obligation to be void; otherwise to remain in full force and virtue.

THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY,
By BROWN & DOLMAN, *Its Agents.* [SEAL.]
THE AMERICAN SURETY CO. OF NEW YORK,
[SEAL.]
By C. F. ENRIGHT *as its Resident Vice President.*

Attest: WILLIAM E. STRINGFELLOW,
Resident Assistant Secretary.

The above bond is hereby approved and ordered to be filed and made a part of the record.

CHARLES F. AMIDON, *Judge.*

627 To Paul Riggs and Eugene De Hart Executors of the estate of Eber B. Roloson deceased greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at Washington D. C. within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, wherein The Northwestern National Life Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles F. Amidon, Judge of the Circuit Court of the United States for the St. Joseph Division of the Western

District of Missouri, this 9th day of May, in the year of our Lord One Thousand Nine Hundred and Five.

CHARLES F. AMIDON, *Judge.*

[Endorsed:] United States Circuit Court. Western District of Missouri. St. Joseph Division. Paul Riggs and Eugene De Hart, executors of the estate of Eber B. Roloson, deceased, *vs.* The Northwestern National Life Insurance Company. Citation. Filed May 12th, 1905. C. C. Colt, Clerk.

UNITED STATES OF AMERICA, *Western District of Missouri, ss:*

We hereby acknowledge due service of the within Citation, this 15th day of May A. D., 1905.

K. B. RANDOLPH,
W. H. HAYNES,
WM. M. FITCH,
Attorneys for Defendant in Error.

UNITED STATES OF AMERICA, *Western District of Missouri, ss:*

I, Calvin C. Colt, Clerk of the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri, hereby certify that the above and foregoing is a full, true and complete transcript of the record, evidence, assignment of errors and all papers and proceedings in the cause above entitled, as fully as the same remain on file and of record in my office. I further certify that the petition for, order allowing appeal, Writ of error, the Citation and a true copy of the appeal bond for writ of error, filed in said cause are also herewith returned.

In witness whereof, I have this 1st day of June, 1905, set my hand as Clerk, and affixed the seal of said Court, at office in the City of St. Joseph, Missouri.

[Seal U. S. Circuit Court, St. Joseph Div., Western Dist. Mo.]

CALVIN C. COLT, *Clerk.*

Endorsed on cover: File No. 19,787. W. Missouri C. C. U. S. Term No. 285. The Northwestern National Life Insurance Company, Plaintiff in Error, *vs.* Paul Riggs and Eugene De Hart, Executors of the Estate of Eber B. Roloson, Deceased. Filed June 5th, 1905. File No. 19,787.

FILE COPY.

Office Supreme Court U. S.
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JAMES H. MCKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 34

THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY,
Plaintiff in Error.

vs.

PAUL RIGGS and EUGENE DEHART, Executors of the Estate of EBER B. ROLOSON, Deceased,
Defendants in Error.

STATEMENT AND BRIEF.

STEPHEN S. BROWN,
W. A. KERR,
JOHN E. DOLMAN,
Attorneys for Plaintiff in Error.

HARDMAN PRESS, ST. JOSEPH, MO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 285.

THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY,
Plaintiff in Error.

vs.

PAUL RIGGS and EUGENE DEHART, Executors of the Estate of EBER B. ROLOSON, Deceased,
Defendants in Error.

Error to the Circuit Court of the United States for the Western District of Missouri.

BRIEF OF PLAINTIFF IN ERROR.

Statement.

[Reference figures refer to page of printed record.]

This suit is founded on two policies of insurance upon the life of Eber B. Roloson, each for $5,000.00, payable to the estate. One of the policies was dated November 21, 1901, (22) and the other May 14, 1902. [23] Roloson died February 28, 1903, testate, and

defendants in error are the executors named in the will, who had, at the time of bringing the suit, qualified as required by law.

Each of the policies contains the following:

"This policy shall not be in force until the final premium is paid, and the policy delivered to and accepted by the insured while in good health.

"At any time when this policy has been two years continuously in force it will be incontestable, except for fraud and non-payment of premiums as provided herein, if the age of the insured has been correctly stated in the application."

The application for the insurance, consisting of parts 1 and 2, (the latter being the medical examination) is in each case copied upon the policy, which provides that it is made a part thereof, and that each and all of the statements and answers made in application "every person accepting or acquiring an interest in this policy adopts as his own, and warrants to be full, complete and true, and agrees to be material."

The application itself, each part of which is signed by the insured, in each case, provides: "No obligation shall arise under this application until the usual policy of insurance shall be issued and delivered to me, I being at that time in good health, and the first premium paid by me." Also that "I warrant the statements and answers written or printed herein, or in part two of this application, to be full, complete and true, whether written by my own hand or not, and agree that every such statement and answer is material to the risk." Also "that I am not afflicted with any disease or disorder; nor have I had any illness, local disease or personal injury not herein set forth."

Each application also contained the following questions and answers thereto:

"Has any company or association ever postponed or declined to grant insurance on your life? No."

"If so, for what reason and by what company or association? No."

"Has any physician ever given an unfavorable opinion upon your life with reference to life inurance or otherwise? No."

"Have you ever had any illness, local disease, injury, mental or nervous disease or infirmity, or ever had any disease, weakness or ailment of the head, throat, lungs, heart, stomach, intestines, liver, kidneys, bladder or any disease or infirmity whatever? No."

"Give name and address of each physician who has prescribed for, or attended you within the past ten years, and for what diseases and ailments. Name Dr. C. O. Patton, McFall, Mo. (b.) For what disease or ailment? Billious attack."

"Has your husband or wife or any other immediate member of your family any tuberculous disease? Only sister had as stated."

The statement referred to in the last answer was that a sister had died of tuberculosis.

Excluding his policies of life insurance Mr. Roloson was, at the time of his death insolvent, his entire assets amounting to only $13,384.00, while his liabilities were $22,870.00. (164) During the fourteen months beginning April 10, 1901, and ending June 16, 1902, (about eight months before his death) he had taken out policies upon his life to the amount of $41,000.00,

which he held at the time of death. Before that time he only had two policies aggregating $3,500.00; one in the Safety Fund Life Association for $3,000.00, dated June 26, 1897, and one in theFraternal Home for $500 dated May 5, 1900. (163)

His wife died of pulmonary tuberculosis in the fall or winter of 1899. (28) The plaintiffs' attorneys stated upon the trial that it was in October, (78) but the physician who treated her thought it was later and so testified. (28) She was under the treatment of Dr. Baker for this disease during the year before her death, (28) and her trouble had developed possibly six months before this treatment began. (29) Mr. Roloson took care of her during the sickness. (29)

He himself became sick in November, 1899, and was under treatment of Dr. Baker from that time until April 19, 1900. This sickness is not denied, and the court so charged the jury. The ailment, as described by the physician, was gastritis of four or five years standing, (27, 28, 29) with general nervousness (27) with very marked symptoms. [31] He was susceptible to tuberculosis, [29, 31] infection with which from his wife was feared by the doctor, who treated him with cod liver oil for this tendency, and at the end of the treatment the patient was in about the same condition as when it began. [27]

Mr. Roloson was perfectly aware of his own condition. Mr. Isaac Matthews talked with him before the death of his wife. He said he felt very bad, and had a bad hurting in his throat, and was bothered with coughing a good deal. That his wife was as bad as he was, and he regarded it as a race between him and his wife which would go first. [38]

Mr. J. L. Johnson stated that he had talked with him after the death of his wife, and eighteen or twenty months before his own, which was the period of his greatest activity in procuring life insurance. [55] Mr. Johnson said: "I remarked that I had a deep seated dyspepsia, and he said if he had nothing worse than that he wouldn't be bothered so bad. I asked him then what was his trouble, and he said it was the so-called consumption." This witness stated [56] that he asked Mr. Roloson whether he had ever been examined to know if he did have consumption, and he said he had but that he knew himself that he had it, that he understood human nature well.

The witness John Redmond said [69] that he heard Mr. Roloson say after his wife's death that he had no other idea only to go the same way himself.

Mr. Thomas Strong testified that Mr. Roloson told him in September, 1901, that his health appeared to be a perfect wreck. [106]

Dr. Isaacs testified [131] that in the spring of 1901, after Mr. Roloson had found out or appeared to have found out that his application for a policy in the State Life Insurance Company of Indiana had been rejected, he remarked to the witness that he felt sometimes like he would not live very long, and that it was his desire to leave his daughter, Lucy—here he was interrupted by the court, and proceeded no further.

There was much testimony on both sides as to the condition of Mr. Roloson's health at the time these applications were made by him and the policies issued. The testimony of the plaintiff in error tends to show that at those times he was afflicted with consumption

and was anaemic; that he knew it; and that he suppressed inquiry by failing to disclose in his application that he had been treated by Dr. Baker. It also shows affirmatively that the policies were issued in reliance upon the statements in the respective applications therefor, and would not have been issued had the answers been in any respect unfavorable.

The proof of death stated that the insured died of progressive anaemia. The evidence tended to show that anaemia is secondary to some other disease, and is caused by consumption and gastritis, [33, 112,113] and that to kill in three months as it was claimed by plaintiff happened in this case, it should have some other grave disease behind it. [125] A large portion of this record is taken up with testimony by which the defendants in error undertook to show that a few months before his death Mr. Roloson met with losses in feeding stock which might have amounted approximately to five thousand dollars, and that this trouble caused the disease (See "The Court" p. 294).

The plaintiff in error offered to prove by the files and records of the Probate Court having charge of the estate, the extent of Mr. Roloson's insolvency at the time of his death as hereinbefore stated. The defendant in error objected to these on the ground "that the condition of the estate would not determine his condition at the time of the issuance of the policies, and for the general reason that it was incompetent, irrelevant and immaterial," upon which the evidence wasexcluded by the court, to which the plaintiff in error excepted, [164] and which it has assigned for error.

The plaintiff in error offered in evidence the will of Eber B. Roloson, dated, January 27, 1903, which contained, among others, the following provisions:

"1. I want all my debts paid without probating, a list of which I will leave with my brother, Howard J. Roloson."

"4. I give and bequeath to my beloved brother, Howard J. Roloson, two thousand dollars, to be used by him according to our agreement, and when that agreement has been fulfilled the balance is to go to him and his heirs, the agreement is not to be attached to this will."

6. I hereby appoint and constitute Paul Riggs and Eugene DeHart, assisted by Howard J. Roloson, the executors of this my last will."

The defendant in error objected to the introduction of the will on the ground "that the same is incompetent, irrelevant and immaterial," which was sustained by the court and the evidence was excluded, to which ruling the plaintiff in error excepted and assigns the same for error.

In connection with the testimony of Dr. Isaacs, the medical examiner, the application of Mr. Roloson to the State Life Insurance Company, of Indianapolis, dated February 11, 1901, for a policy of five thousand dollars was introduced in evidence. [140] On the back of it was endorsed the following:

Accepted February 26. 1901

Reconsidered and declined April 20, 1901.

Harrison Maxwell.
Medical Director.

In connection with this, two letters of Dr. Isaacs to the company were introduced; the first, dated March 3, 1901, saying about Mr. Roloson: "I have re-examined him, and while I find him in very good

physical condition his temperature is 99 2-5, and his general appearance indicates a diseased condition. I therefore think it best to postpone the issuance of insurance to him for a while at least. . Please consider this confidential and if you desire further information concerning him I will gladly furnish the same."

The next letter, dated March 27, 1901, asked for the appointment of another physician to assist in re-examining the applicant.

The plaintiff in error then offered a letter [142] of Dr. Isaacs to the company stating that he re-examined Mr. Roloson, and recommended that the case be postponed indefinitely. This was dated April 18, 1901, and closed as follows: "I trust you will consider this confidential, as I do not want to make him an enemy."

This was objected to with the other letters on the ground "that Mr. Roloson was in no manner bound by them, and that Mr. Roloson took no part in the writing of these letters. If they were *ex parte* communications of this person to the company, and were no part of the report, and this is not the company that he was insured in, nor the company that is now on trial, and Mr. Roloson could be in no manner bound by these letters, and they contain no statements emanting from Mr. Roloson."

This objection was, as to this letter, sustained by the court and the letter excluded, to which the plaintiff in error excepted, and assigned it for error.

Dr. Isaacs stated that the defendant in error Mr. DeHart called upon him with Mr. Roloson [142] and stated that he would like to see him get the insurance as a friend. [143] This was, on motion of defendant in error, stricken out by the court, to which the plain-

tiff in error excepted and has assigned it for error. Mr. DeHart was not called to deny it, although present in court. [304]

The plaintiff in error offered the deposition of Paul S. Knowles, the assistant secretary of the State Life Insurance Company of Indianapolis, in which, after identifying himself and the application and letters to that company already referred to, he testified as follows: [149]

"The application of Mr. Roloson was received at the office and accepted by our medical department February 26, 1901, and a few days subsequent our company received a letter dated March 3, 1901, from Dr. G. W. Isaacs, who made the original examination. On the information contained in the letter referred to this company reconsidered the application, and although the policy had been written, but never delivered, it was recalled by telegram to the agent and the policy was returned to this office and never delivered, and the application was finally declined on April 20, 1901, after some further correspondence with Dr. Isaacs, as shown in copies of letters attached hereto."

Also the deposition of Harvey R. Ellsworth, stating that the application was rejected. (149)

These were objected to by the defendant in error on the grounds "that it has no tendency to throw any light on any issue in this case, and it is not by an officer of a defendant company and has no reference to the insurance in litigation, and the further objection that it is for the purpose of showing the insurance had been declined, and that is not a proper issue in this case."

This objection was sustained by the court, to which ruling plaintiff in error excepted, and has assigned it for error.

The plaintiff in error also offered to prove by the witness, Dr. Isaacs, that long before the making of the first application in this case Mr. Roloson was advised of the reasons for the rejection of his application to the State Life Insurance Company, of Indianapolis. The defendant in error objected to this evidence on the ground that it was "incompetent, irrelevant and immaterial," and the court excluded it, as to which plaintiff in error excepted and assigned error.

The plaintiff in error requested the court to charge the jury as follows: [339, 343]

"1. That the Missouri Statute, Sec. 7890 is not applicable to this case, neither to the issues thereof, norto the policies involved therein, nor either of them."

"2. That said statute as applied to the facts in this case is unconstitutional and void, and in conflict with Sec. 1 of the 14th amendment to the constitution of the United States."

"3. That plaintiffs cannot recover herein, and that the verdict must be for the defendant."

Each of which requests was refused by the court, exception taken and the action assigned for error.

The plaintiff in error then asked the court to charge separately as to each count in the petition, that the plaintiff could not recover on such count if the jury should find from the evidence that the policy mentioned in such count "was not delivered to and accepted by the insured while he was in good health." (340) This was refused, and exception taken, (343) and the court charged as follows:

"I now desire to call your attention to a provision of the policy. It is the first provision on the back of

the policy. It reads as follows; 'This policy shall not be in force until the first premium is paid and the policy delivered to and accepted by the insured while in good health.' Now if you find that at the time either of these policies were delivered to Mr. Roloson and accepted by him that he was not in good health, *and that the sickness or disease from which he was suffering actually contributed to his death*, then the policies never took effect, and it would be your duty to find for the defendant. But if you find that he was well, or in good health at the time the policies was delivered, or, in case he was not in good health, that the sickness or disease from which he was suffering did not actually contribute to cause his death, then the fact of his sickness or disease would be wholly immaterial, and, so far as this provision of the policy is concerned, it would still be your duty to find in favor of the plaintiffs."

To this plaintiff in error excepted, [351].

The plaintiff in error also requested the court to charge, as to each count of the petition, as follows:

"That the plaintiff cannot recover * * * if the jury find from the evidence that at the time of his making the application for the policy therein sued upon Eber B. Roloson knowingly, falsely and fraudulently, and with the purpose and intent to deceive and mislead defendant into accepting such application and issuing a policy thereon, misrepresented in said application any matter concerning his health, life or physical condition, which would naturally and reasonably affect the action of defendant in considering said application and accepting or rejecting the same, and in such case the Missouri Statute Section 7890 is not applicable, and if applied would be in violation of Section 1, of the 14th amendment to the constitution of the United States. Also:

"Plaintiffs cannot recover upon a policy if the jury find from the evidence that in his written application therefor Roloson knowingly, falsely and fraudulently, and with intention to deceive and mislead defendant, made therein any untrue warranty or representation to defendant, concerning any matter then material to the risk of insuring his life." [341] Also:

"That the jury must find for the defendent * * if they believe from the evidence that at the time of making the application for the policy therein sued on, Eber B. Roloson was in bad health, and knew said fact, and that he knowingly, falsely and fraudulently and with the purpose and intent to deceive and mislead defendant into accepting said application and issuing a policy thereon made the statement in said application that he was then and had been for twelve months in good health, and free from all ailments, diseases, weaknesses and infirmities, and that the defendant was deceived thereby and issued said policy when it would not otherwise have done so, whether any disease, weakness or infirmity he then had contributed to his death or not; and in such case Section 7890 of the Revised Statutes of Missouri, 1899, is not applicable, and if applied would be in violation of Section 1 of the 14th amendment to the constitution of the United States."

The court refused each of the foregoing requests, and the plaintiff in error excepted. [342, 343].

The court, against the objection of the plaintiff in error, charged as follows:

"In order to sustain the defense made by the insurance companies as to Mr. Roloson's representations and warranties in the written applications, you must find, first, that Roloson was, or had been, afflicted by

some sickness or disease; second, that his answer as to such sickness or disease was untrue or incomplete; third, that such sickness or disease actually contributed to Mr. Roloson's death." [350] Also:

"It is bound to show, first, that Mr. Roloson, either at the time the application was made or the policy delivered, or at some time previous thereto, was afflicted with a disease, or with sickness, and that such disease or sickness actually contributed to his death." (352)

And, calling attention to Section 7890 of the Revised Statutes of Missouri, 1899, the court, in its charge said: "And the policy should be construed by you and given effect in this case just as if that language had been incorporated among its provisions, and as if the policy read: No misrepresentation or false warranty made in obtaining this policy of insurance shall be deemed material, or render the policy void, unless the matter to which such misrepresentation or false warranty relates shall actually contribute to the death of Mr. Roloson." (350)

Each of the said portions of the charge included in the three preceding paragraphs was excepted to by the plaintiff in error.

The court, after stating that a "part of the evidence in this case relates to declarations made by Mr. Roloson himself as to the condition of his health;" (348) and that "the evidence showed that during this period which we have been investigating, during at least a portion of it, Mr. Roloson was suffering from a great grief owing to the loss of his wife," (348) charged as follows:

"It is a matter of common experience that a mind suffering from such an affliction does not view the affairs of life, or life itself, as men view it under ordinary circumstances, and that he may give utterance to expressions as to his health or his prospects in life which are merely the expression of his despondency, or his fear, and not the deliberate expression of his actual opinion or judgment, and it is proper for you to consider these matters in determining what weight you will attach to the evidence as to Mr. Roloson's declarations as to his health and sickness." (348)

The plaintiff excepted, and all matters of exception hereinbefore stated, relating to the charge of the judge or his refusal to charge are assigned for error.

The constitutional question raised and relied on in the requests of the plaintiff in error to charge the jury, was also again raised and insisted upon in a motion for a new trial. (353)

The petition states that the plaintiff in error has complied with all the laws of the state of Missouri, which entitles it to do business in said state, and that at all times mentioned in the petition it has been so entitled.

All the matters of defense relied on were pleaded in the answer, which stated, among other things that Roloson and Dr. Lee, the medical examiner, conspired to obtain the policy by the fraudulent means stated.

Two witnesses, patients of Dr. Lee, testified that in the winter of 1900 and 1901 he spoke to them disparaging of Mr. Roloson as an insurance risk [333-4], and one [336] that the doctor told him that he had paseed Roloson because he (Dr. Lee) was a young man just starting in business and wanted his patronage.

The following questions are raised by the record and are submitted for the determination of this court:

1. The trial court having decided that, by the terms of Section 7890 of the Revised Statutes of Missouri of 1899, the plaintiff in error is precluded from showing as a defense to this suit that the policies sued on were obtained from it by fraud and misrepresentation practiced upon it by the insured both as to the state of his health and as to other matters important to be considered in issuing said policy, it is submitted that the state statute as so construed, deprives the plaintiff in error of its liberty and property without due process of law, and while it is lawfully within the jurisdiction of the state, denies it the equal protection of the laws, contrary to the provisions of Section 1, of the Fourteenth Amendment to the constitution of the United States.

2. That the trial court erred in holding that the terms of said Section 7890 precluded the plaintiff in error from showing, as a defense, that the policies sued on were not delivered to and accepted by the insured while in good health.

3. That the trial court also erred in excluding the evidence offered by the plaintiff in error that the State Life Insurance Company of Indianapolis had in April, 1901, declined to grant insurance on the life of Mr. Roloson; and in holding and charging that such fact constituted no defense.

4. That it also erred in telling the jury in substance and meaning that it was a matter of common experience that the death of Mrs. Roleson would incline Mr. Roleson to say things about his health which were not the deliberate expression of his actual opinion or

judgment, although some of the expressions to which said charge was applied were uttered more than a year and a half after his bereavement.

5. It also committed error in excluding the will and records showing the condition of Mr. Roleson's estate.

ARGUMENT

I.

The first question in this case, and the one on which the appellate jurisdiction of this court is invoked is whether section 7890 of the Revised Statutes of Missouri of 1899, as interpreted to the jury by the trial court, is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Smiley vs. Kansas, 196 U. S. 447, 454.
Mo., Kas. and Texas Ry. Co. vs. Haber, 169 U. S., 613, 639.
Chicago, B. & Q. Railroad vs. Chicago, 166 U. S. 226, 242, 246.

The section of the Missouri Statute referred to is as follows:

"No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case, shall be a question for the jury."

The court interpreted this to mean that no fraudulent representation or pretense by which the insured

might obtain such a policy, could be shown as a defense, unless, at the time of making such representation or receiving the policy, or at some time previous thereto the insured was afflicted with a disease or sickness, that the representation was with respect to such disease or sickness, and that the same disease or sickness actually contributed to his death.

This necessarily involves the proposition that the fraud, supplemented by the act of the legislature, constitutes due process of law by which the insurer may be deprived, first of its policy, and next of the money in payment thereof within the meaning of the Federal Constitution.

As to other contracts, the rule of the common law by which they are avoided for fraud is left in force, so that money invested in all other enterprises is protected against such wrongs. In addition to this, the obtaining designedly by any false pretense of the signature of any person to any written instrument is punishable as larceny of the amount "which in any event or contingency might be collected thereon." 1 R. S. Mo. 1899 Secs. 1927, 1902; State vs. O'Connell 144 Mo. 387, 392. The position of the court also implies that the removal of protection against fraud from the funds held by insurance companies for their policy-holders, is not a denial to them of the equal protection of the laws.

"By the Fourteenth Amendment it is provided that no state shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws. That corporations are persons within the meaning of this amendment is now settled."

Smyth vs. Ames, 169 U. S. 466, 522; citing:
Santa Clara County vs. So. Pac. Railroad 118 U. S. 394; 396.
Charlotte, Columbia & Augusta Railroad vs. Gibbs, 142, U. S. 386, 391;
Gulf, Colorado and S. F. Railway vs. Ellis 165 U. S. 150, 154.

See also:
St. Louis & S. F. railway vs. Gill 156 U. S. 649, 657;
Chicago, M. & St. P. Railway vs Minnesota, 134 U. S. 418;
Reagan vs. Farmers' Loan & Trust Co. 154 U S. 362.

And this constitutional protection extends equally to those quasi public corporations, whose property is devoted to service of a public nature by the law of their creation, and who are therefore more peculiarly under governmental control. If such a company "is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

Chicago, Milwaukee & St. Paul Ry. vs. Minnesota *supra* 458.
Smythe vs. Ames, *supra*, 523.

"The equal protection of the laws—the spirit of common justice—forbids that one class should be compelled to suffer loss that others may make gains."

Reagan vs. Farmers Loan & Trust Co., *supra*, 410.

In view of the vast amount of the property of the people necessarily invested and managed by corporations the guaranty of the constitution would be weak indeed did it not extend to these interests. "The rights and securitities guaranteed to persons by that instrument cannot be disregarded in respect to those artificial entities called corporations, any more than they can in respect to the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny to corporations the equal protection of the laws than it has to individuals.

Gulf, Colorado & S. F. Railway vs. Ellis, *supra*, 154.

In *Santa Clara County vs. Southern Pacific, Railway Company, supra, 396*, Mr. Chief Justice Waite said for this court: "The court does not wish to hear argument on the question whether the provision of the Fourteenth Amendment to the Constitution, which forbids a State to deny any person within its juridiction, the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

The position of the plaintiff in error is not affected by the fact that it is a foreign insurance company.

The legislature has not attempted to make the section of the Missouri laws we are considering a condition to its doing business in the state. It is in general terms, and hits all insurance companies. If it is

invalid as to some it is invalid as to all. A company lawfully doing business in the State, is no more bound by a general unconstitutional enactment than a citizen of the state.

Carroll vs. Greenwich Insurance Co. 199 U. S., 401, 409 and cases cited.

The right to make contracts is an indispensable incident to property, without which it cannot be lawfully acquired as between living persons nor effectively preserved or used.

"In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto."

Allgeyer vs. Louisiana 165 U. S. 578, 591.
Holden vs. Hardy, 169 U. S. 366, 391.

The privilege of contracting is both a liberty and a property right.

Frorer vs. The People, 141 Ill., 171, 181.

"The Fourteenth Amendment, in declaring that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights, that all persons should be equally entitled to pursue their happiness and acquire and enjoy property, that they should have like access to the

courts of the country for the protection of their persons and property, the protection and redress of wrongs and the enforcement of contracts."

Barbier vs. Connolly, 113 U. S. 27, 31.
Yick Wo vs. Hopkins, 118 U. S. 356, 369.
Connelly vs. Union Sewer Pipe Co., 184 U. S., 540 559.

"The Ohio statutes, in denying to the employees of a railroad corporation the right to make their own contracts concerning their own labor, is depriving them of liberty and the right to exercise the privileges of manhood without due process of law."

Shaver vs. Pennsylvania Co., 71 Fed. Rep., 931, 939.

The case last cited is, in principle, strikingly illustrative of the question now under discussion. The Voluntary Relief Department of a railroad company was organized to create and manage a fund made up by the contributions of members and of the railroad company, together with interest, gifts, etc., for the purpose of affording relief to disabled employees of the railroad company who were members. Membership was confined to employees of the railroad company, was purely voluntary and could be terminated at any time. In his application the employe agreed that if he should bring suit against the railway company for injuries, payment of benefit from the relief fund should not be made until the suit was discontinued, or if prosecuted any payment on judgment or compromise should preclude any claim on the relief fund.

The statute of Ohio under consideration, provided:

"And no railroad company, insurance company, or association of other persons, shall demand, expect, require or enter into any contract agreement or stipulation with any other person about to enter, or in the employment of any railroad company, whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company, thereafter arising from personal injury or death, or whereby he agrees to surrender or waive, in case he asserts the same any other right whatsoever, and all such stipulations and agreements shall be void."

It was contended that this statute invalidated the agreement of the applicant for membership in the Voluntary Relief Department, but the court held it unconstitutional for reasons indicated in the above extract from the opinion.

In *State vs. Julow, 129 Mo. 163, 172*, the Supreme Court of that State says:

"These terms, 'life,' 'liberty,' and 'property,' are representative terms and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties—personal, civil, and political; in short,all that *makes life worth living;* and of none of these liberties can anyone be deprived, except by due process of law. 2 Story, Const. [5 Ed.] Sec. 1950." And quoting from *State vs. Goodwill*, 35 W. Va., 179, the court adds:

"The right to contract, to use, buy and sell property, and contract in respect thereto, including con-

tracts for labor—which is, as we have seen property—is protected by the constitution."

"Due process of law" and "law of the land," which are synonymous, necessarily refer to a pre-existing rule of conduct, and are intended to secure the individual from the arbitrary exercise of the powers of the government, unrestrained by the established principles of private rights and distributive justice. These terms were intended to perpetuate old and well established principles of right and justice by securing them from abrogation or violation.

"There is nothing technical, or, we think, obscure in the requirement that process which divests property shall be due process of law. The constitution makes no attempt to define such process, but assumes that custom and law have already settled what it is. Even in judicial proceedings we do not ascertain from the constitution what is lawful process, but we test their action by principles that were before the constitution, and the benefit or which we assume that the constitution intended to perpetuate."

Judge Cooley in Weimer vs. Bembury 30 Mich. 201.

And the same eminent judge has expressed the same idea in his work on Constitutional Limitations [6 Ed.] 443 in the following language:

"Due process of law in each particular case means an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as

these maxims prescribe for the class of cases to which the one in question belongs."

The Supreme Court of Nebraska, in *Chicago, Burlington and Quincy Railroad Company vs. State*, 47 Neb. 549, 566, said that among the definitions of "due process of law" the one last quoted from Judge Cooley "appears to have proved the most acceptable to the courts of this country," and a much more extensive examination of the cases than would be justifiable here, shows the remark to be well founded.

Judge Cooley in the same work [1 Ed] 208, goes a step further in directing us to the repository of those principles of equal justice which are the subject of this constitutional guaranty. He says: "The maxims of the Magna Charta and the Common Law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do, cannot be conceded within any grant or apportionment of power which the people in general terms have made to those departments."

"Life, liberty and property have a substantial protection against serious invasion in the traditions of the English-speaking race."

People vs. Budd, 117 N. Y. 1, 28.

And in the same case, the court, referring to the same constitutional guaranty we are now considering, said: "It was designed for the protection of personal and private rights against encroachments by the legislative body not sanctioned by the principles of civil liberty as held and understood when the constitution was adopted." (Id. p. 8)

"There are certain vital principles in our free republican governments which will determine and overrule apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof government was established.

Calder vs. Bull, 3 Dall. 386, 388.

Mr. Sedgwick, in his work on statutory and constitutional law, at page 149 says:

"In this country, however, a disposition has been manifested, and by high authority, to adhere to the doctrine of early English cases which we have cited, to deny the existence of any despotic or arbitrary authority in the legislature, and to assert an inherent power in the judiciary, independently of constitutional provisions, to annul a legislative enactment considered by them to be contrary to the fundamental principles of natural justice or morality."

We have quoted so largely from these maxims which by common judicial consent and constant use have become interpreters of the constitional provisions we are considering, to impress the fact that "due process of law" does not mean "a statute passed for working the wrong," (Cooley Const. Lim. 1 Ed. 353) but that these guarantees were made a part of the form of government to protect the lives, liberties and property of the people against encroachments of the state itself, (which includes every department of the state government), not sanctioned by the principles of civil liberty, natural justice and morality as held and understood at the time of their adoption, and that for the purpose of ascertaining and defining these principles we must

consult the traditions of our race as perpetuated in the maxims of Magna Charta and the common law.

Having these principles in mind it becomes a necessary "conclusion of reason" that a statute that has the effect to enable one to obtain the property of another by fraud, which "is even more odious than force" (1 Sto. Eq. Jur. 15 Ed. 200) and when the fraud shall have been accomplished, vests the title in the wrong doer, is obnoxious to that provision of the constitution which forbids the state to deprive one of his property without due process of law.

The Missouri statute employs no artifice, wastes no language, to conceal its real character. There is no pretence that it partakes of the nature of a special statute of limitation. The insured may be in the last throes of dissolution when he receives his policy, and immediately commit suicide. This statute, as interpreted by the court, will bar any defense growing out of the acceptance of the policy while in that condition, and section 7896 of the same statute will exclude the defense of suicide because it was only contemplated after the application had been made. If a woman should fraudulently represent that she was a man to obtain insurance in a company which only insured men, and should immediately die, the fraud would constitute no defense. The statute is simply notice to the world that if any one, shall succeed by fraud and deceit in inducing the insurance company to issue its policy, the state will do the rest.

In *Boyd vs. United States* 116 U. S. 616, this court had under consideration an act of congress authorizing

a court of the United States in revenue cases, on motion of the government's attorney, to require the defendant or claimant to produce in court his private books, invoices and papers, or else the allegations of the attorney should be taken as confessed. In holding that this was the equivalent of an unreasonable search and seizure within the meaning of the Fourth Amendment, this court p. 635, said: "Though the proceeding in question is divested of many of the aggrevating incidents of actual search and seizure, yet, as before said, it contains their substance and essence and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form, but illigitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In this case as in the one from which the above quotation is taken there are no features of actual physical violence in the taking of this contract, but, as we have seen, the means actually employed are esteemed in law more odious than force, as they are more insidious and dangerous in their operation.

"If there is one occasion more than another which calls upon the court to vindicate the fundamental law it is upon complaint of a suitor who shows that there

has been an attempt, by hostile and discriminative legislation, to bar his right to the ultimate processes of the court, for such an attempt strikes at the very root of justice."

McKinster vs. Sager, 72 N. E. Rep. 815, (Ind).

The maxims of the common law abound in denunciations of fraud.

"Fraud, both at law and in equity, when sufficiently proved and ascertained, avoids a contract *ab initio*, whether the fraud be intended to operate against one of the contracting parties, or against third parties, or against the public."

1 Beauviers Law Dic. 690, and cases cited:

A right of action cannot arise out of fraud. Broom's Leg. Max. [3 Ed] 463, star page 572.

If a person induces another to enter into a contract by fraudulent representations or concealment, he connot defeat the other's right to rescind by offering to make his representations good, for fraud avoids a contract *ab initio* and the party committing it can take no advantage of it, and acquires no right or interest by virture thereof.

Merritt vs. Robinson, 35, Ark. 483.

"All laws as well as all contracts may by controlled in their operation and effect by general fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized

countries, and have nowhere been superceded by statutes."

Riggs vs. Palmer, 115 N. Y. 506, 511, 12.

"Fraud will vitiate any, even the most solemn transactions; and an asserted title to property, founded upon it is utterly void."

United States vs. The Amistad, 15 Pet. 518, 594;
Catts vs. Phalen, 2 How 376, 381;
Cochran vs. Cummings, 4 Dall, 250.

And this principle has in no case found or deserved a more uniform application than in case of policies of insurance upon both life and property.

Carrollton etc. Co. vs. American etc. Co., 115, Fed. Rep., 77
Livingston vs. Insurance Co., 7 Cranch, 506;
Hubbard vs. Association, 100 Fed. Rep. 719.
Mattison vs. Modern Samaritans, 91 Minn., 434.
Koerts vs. Grand Lodge Hermann's Sons, 119 Wis., 525.
Rupert vs. Supreme Court U. O. F.; (Minn) 102 N. W. 715.
Royal Neighbors, etc. vs. Wallace (Neb) 102 N W., 1020
Spencer vs. Phoenix etc., Ins. Co.. 119 Wis. 530.
Hanf vs. Northwestern etc. Assn., 76 Wis. 450.
Ketcham vs. American etc. Assn. 117 Mich. 521.
N. Y. Life Ins. Co. vs. Fletcher, 117, U. S., 519.

As we have already seen, a contract may be avoided for fraud without reference to whom the fraud may be directed against—whether it be one of the parties, a stranger to the agreement, or the public. It is a

matter affecting the public morals and the policy of the state, and one may not even make a valid contract that he will stand bound by fraud.

"I cannot effectually contract with any one that he shall charge himself with the faults which I shall commit; a man cannot validly contract that he shall be irresponsible for fraud." Broom's Max 668, [quoted 14 Am. and Eng. Enc. of Law. 2 Ed 157 n.]

Bridger vs. Goldsmith, 143, N. Y. 424.
Hofflin vs. Moss, 67, Fed. Rep. 440.
Wilcox vs. Howell, 44 N. Y. 398.

In *Hoffman vs. Moss, supra*, Judge Caldwell speaking for the Circuit Court of Appeals, Eighth Circuit, said: (p 444) "False and frandulent representations made by one party to a contract, by which the other party is induced to enter into the contract, render it voidable at the election of the defrauded party, and a stipulation in such a contract to the effect that the false and fraudulent representations by which one party induced the other to enter into it, shall not affect its validity is itself of no validity. No one can be estopped by anything contained in an instrument, which instrument was itself obtained from him by fraud and deceit. The law will not give effect to a stipulation intended to grant immunity to iniquity and fraud."

In *Bridgewater vs. Goldsmith, supra* (428-9) the court said: "A mere devise of a guilty party to a contract intended to shield himself from the results of his own fraud, practiced upon the other party, cannot well be elevated to the dignity and importance of an equitable estoppel. If the clause has any effect whatever,

it must be as a promise or agreement on the part of the plaintiff, that however grossly he may have been deceived and defrauded by the defendant, he would never allege it against the transaction or complain of it, but would forever after hold his peace. It is difficult to conceive that such a clause would ever be suggested by a party to a contract unless there was in his own mind, at least, a lingering doubt as to the honesty and integrity of his contract. I assume that there is no authority that we are required to follow in support of a proposition that a party who has perpetrated a fraud upon his neighbor may nevertheless contract with him in the very instrument by means of which it was perpetrated, for immunity against its consequences, close his mouth from complaining of it, and bind him never to seek redress. Public policy and morality are both ignored if such an agreement can be given effect in a court of justice The maxim that fraud vitiates every transaction would no longer be the rule but the exception. It could be applied then only in such cases as the guilty party neglected to protect himself by means of such a stipulation. Such a principle would in a short time break down every barrier which the law has erected against fraudulent dealing. * * * * In fact, it was but a link in the chain, the crowning act which was to secure the defendant the full fruits of the frand and thus enable him not only to overreach the plaintiff, but the law itself."

The opinion of the Supreme Judicial Court of Massachusetts in *Regan vs. Union Mutual Life Insurance Company*, decided last December, and reported in 76 N. E. 217 and 218, contains the most condensed and thorough discussion of this question as applied to insurance to which our attention has been called. The

policy contained the following clause: "This policy is incontestable from date of issue for any cause except non-payment of premiums." The court, after an interesting discussion of many cases, decided that "an agreement to be bound by a contract which the parties are making, in spite of subsequently discovered fraud by which it was obtained, would be subversive of sound morality;" and concluded: "If we treat it as intended to include fraud among the matters which cannot be set up in defense, and this perhaps is its most probable meaning, we are of the opinion that this part of the provision is against the policy of our law and therefore void."

And this court in *Columbia Insurance Company vs. Lawrence*, 10 Peters 507, in considering the same subject in its relation to fire insurance said: "Fraudulent losses are necessarily excepted upon principles of general policy and morals, for no man can be permitted, in a court of justice to allege his own turpitude as a ground of recovery in a suit."

Fraud, by which a person acquires the property of another is against public policy and good morals for precisely the same reason that horse stealing is against them. It originates in a desire to wrongfully obtain the property of another and is carried out by an act so fundamentally indefensible that it is made a felony by the law of the land. No argument can be made in favor of the constitutionality of legislation which permits one of these which does not equally apply to the other.

This crowning act of fraud which the maxims of the law, and the principles of public policy and mortality forbade the in-

sured to perpetrate for himself, the legislature undertook to do for him, by writing into his policy, as suggested by the trial court in its charge, the provision sheilding him from the consequences of his own fraud. This does not constitute due process of law, or afford to the insurance company the equal protection of the laws, unless there is something in the fact that it is a life insurance company which justifies it. If there is any constitutional ground for such imposition, we must look to the police power of the state to find it.

"The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole."

Boyd vs. United States, 116 U. S. 616, 627.

The insurance company holds its property in trust for the performance of its contracts with all its policy holders, who have chosen this particular investment for the benefit of their estates or other beneficiaries at their death. There does not seem to be anything in this use to call for or justify the withdrawal from such a fund of any of those constitutional guarantees by which other investments are protected. There is no single reason calling for security and certainty in the performance of its undertakings by the company, that does not call with equal force for the utmost candor and good faith on the part of the applicant for a policy.

In the administration of this fund certain duties rest upon the company, one of which is to take no risks not justified by the premium paid and the rules of good business. It is unnecessary to argue that the question whether one is sick or well, at the time insurance is effected on his life is material to the risk, and that a rule is at least reasonable which provides against the insurance of the lives of sick men.

With respect to the materiality of the matter contained in some other false statements by which this insurance was obtained, the supreme court of Missouri has itself spoken. In *Aloe vs. Mutual Reserve Life Association*, 147 Mo. 561, 578-9, that court said:

"It was shown by several physicians who testified on the part of defendant on the trial that the statements made by Aloe in his application for insurance, that he had not consulted or been treated by a physician for thirty years, were untrue. The object of this inquiry suggests itself. If he had not consulted or been treated by a physician during that time, that was the end of it. But if he had consulted a physician or been treated by one during that time the defendant had the right to know it, by whom and what for, so that it might ascertain the particulars from him. [U. B. Aid Society vs. O'Hara, 120 Pa. St. 256.]

"It has been repeatedly held that such questions called for important information which the assured was bound to give truthfully. [McCollum vs. Ins. Co. 55 Hun. 103 S. C.; 124 N. Y. 642; Cobb vs. Covenant Mutual Benefit Association, 153 Mass. 176; U. B. Mut. Aid Society vs. O'Hara, 120 Pa. St. 256; Ins. Co. vs. McTague, 49 N. J. L. 587; Cummings vs. Ins. Co. 89 Me. 37; Mengel vs. Ins. Co. 176 Pa. St. 280.]

"In answer to the questions put to him in his application for insurance as to whether or not any proposal by him to insure had ever been postponed or denied, and if so by what company or association, and for what reason, he answered: 'Yes New York and Connecticut Mutual, about six years ago on account of traces of albumen;' while the record discloses that he had been rejected eight times by six companies, while he disclosed but two.

"In Ins. C. vs. Raddin, 120 U. S. 189, it is said: 'Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract.' See also Carpenter vs. Ins. Co. 16 Pet. 495.

"The uncontradicted evidence in this case showed that Aloe applied for insurance in different companies prior to his application in this case, and had been rejected. That his answer did not disclose the truth, cannot be disputed upon the uncontradicted evidence. The answer was a warranty and the evidence showed a breach thereof."

In *McCollum vs. Ins. Co.* 55 Hun. 103 *Supra*, affirmed by the court of appeals in 124 N. Y. 642, the court said:

"The insured was also asked, by a question contained in the application: '*Question.* When were you last attended by a physician? Q. Forwhat disease or ailment?' He answered those questions as follows: '*Answer.* Never for sickness.' These questions also called for important information which the insured was bound to give truthfully."

In Ins. Co. vs. McTeague, 49 N. J. L. 587, the court in the last paragraph of the opinion, referring to a statement by the insured in a revival application, that he had not, since the policy was issued, consulted or been prescribed for by any physician, said: "Indeed, so material does such a representation seem to be to the contract proposed by the application, that, in my judgment, if made falsely and knowingly, it would avoid the contract."

Upon the same point the supreme court of Pennsylvania in U. B. Mut. Aid Society vs O'Hara 120 Pa. St. 256, in the last paragraph of the opinion, says: "If the insured had no medical attendance within the time prescribed, and so answers, that is the end of it. But if he had such attendance, then the company is entitled to know for what cause he had medical advise or aid, and the name and address of the doctor, in order that they may ascertain the particulars from him; and, if the insured falsely answer that he had no medical attendance, he is not entitled to recover."

Had Mr. Roloson disclosed that, shortly before he made application for these policies, he had been under treatment of Dr. Baker for several consecutive months, inquiry would have developed his persistent nervous and gastric trouble, and susceptibility to tuberculosis as detailed by that physician in his testimony. Had he answered the truth of his rejection by the State Life Insurance Company, inquiry suggested by it would have developed the Isaacs episode. In either case the policies would not have been issued.

The effect of the statute is not only to compel the insurance company to ascertain all the facts at its peril before issuing its policy, but, as we have seen, it

legalizes the very fraud by which such inquiry is pre-
vented.

Something which has been designated the police
power of the state has already been suggested in justi-
fication of this statute. This power has been referred
to by Chief Justice Shaw in *Commonwealth vs. Alger*,
7 Cush, 53, 85, as the power "to make, ordain and es-
tablish all manner of wholesome and reasonable laws,
statutes and ordinancee, either with penalties or with-
out, not repugnant to the constitution, as the shall
judge to be for the good and welfare of the common-
wealth and of the subjects of the same."

Mr. Justice Harlan, for this court, *Michigan South-
ern Railway vs. Ohio*, 173 U. S. 285, 297, said: "But
in our opinion the power, whether called police, gov-
ernmental or legislative, exists in each state, by appro-
priate enactments not forbidden by its own constitution
or by the constitution of the United States, to regulate
the relative rights and duties of all persons and corpo-
rations within its jurisdiction, and therefore to provide
for the public convenience and the public good."

Mr. Justice Peckham in *Lake Shore etc. Railway
Co. vs. Smith*, 173 U. S. 684, 689, said: "This power
must, however, be exercised in subordination to the
provisions of the Federal Constitution. If, in the as-
sumed exercise of its police power the legislature of a
state plainly violates a provisison of the constitution
of the United States, such legislation would be void."

All this means that the governmental power of the
state, by whatever name it may be called, must be ex-
ercised in subordination to the Federal Constitution.
Where that instrument ordains that no person shall
be deprived of life, liberty or property without due

process of law there is no room for intelligent speculation or mistake as to its meaning. It means that no person shall be so deprived contrary to those principles of right and justice which were recognized as fundamental and were therefore intended to be preserved by it.

At that time it was considered equally wrong to steal a man's horse from his stable or to deprive him of it by fraud and deceit, and it seems self-evident that the provision referred to was intended to protect him equally against both these wrongs and that a statute providing that the horse, if found among his assets at his death should pass to his administrator discharged of all claim of the true owner, would be equally unconstitutional in either case; and that if it were only directed against insurance companies it would deprive them of the equal protection of the laws. The statute would not, in either case, be a valid exercise of the police power because it would violate a property right protected by the constitution of the United States. Yet in neither case would the principle or rule of property so violated be older or more generally accepted or more fundamental than the one involved in this case.

In speaking of this same statute the Kansas City Court of Appeals, in *Ashford vs. Ins. Co.*, 80 Mo. App. 638, 649, said: "To give the statute the meaning and breadth of application contended for by plaintiff would render insurers a prey to all manner of fraud and deception, helpless in all instances save where the matter of fraud contributed to the death. We think it ought not to be so interpreted."

In *White vs. Connecticut Mutual Life Ins. Co.* 4 Dill. 177, 29 Fed. Cas. 1011, 1014, Judge Krekel

charged the jury with reference to this same statute, that "it still remains true, notwithstanding the statute that the contract of insurance is eminently one which presupposes and requires good faith, honest representations and fair conduct on the part of both parties—of the persons who obtain the insurance and the company which grants the insurance." He concluded that the remedial provisions of the statute "do not extend to cases where the 'representations made in obtaining or securing the policy' were knowingly false, and made with a view to mislead or deceive the company." This short charge is interesting on account of the strength and tersenese of its reasoning, and we recommend its perusal.

The position that statutes of this character are beyond the constitutional power of the legislature is not a new one. Judge Cooley in his Constitutional Limitations, (4 Ed.) p. 459, says: "Public officers may connive with rogues to rob the citizen of his property, and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law."

Mr. Pomeroy (Eq. Jur. Sec. 431) says: "The court of equity has, from a very early period, decided that even an act of parliament shall not be used as an instrument of fraud, and if, in the machinery for perpetrating a fraud, an act of Parliament intervenes, the court of equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title under that act, and imposes on him a personal obligahion, because he applies the act as an instrument of fraud."

A cleaner statment of this case cannot be imagined. The deceased by fraud obtained a policy in which the law holds this statute to be written, and his representatives now claim title uuder that statute.

In *Orient Insurance Company vs. Daggs*, 172 U. S. 557, 564-5, this court had under considerations a statute of Missouri which provided: "In all suits brought upon policies of insurance againt loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property, *and in case of total loss of the property insured, the measure of damages shall be the amount for which the same was insured*, less whatever depreciation in value below the amount for which the property is insured the property may have sustained between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant." It is also provided that no condition in any policy of insurance contrary to such provison shall be legal or valid.

In answer to the objection that this statute was unconstitutional the court said: "It makes no contract for the parties. In this it permits absolute freedom. It leaves them to fix the valuation of the property upon such prudence and inquiry as they choose. It only ascribes estoppel after this is done—estoppel, it must be observed, to the acts of the parties, and only to their acts in open and honest dealing. Its presumptions cannot be urged against fraud, and it permits the subsequent depreciation of the property to be shown.

"We see no risk to insurance companies in this statute. How can it come? Not from fraud and not from change, because, as we have seen, the presumptions of the statute do not obtain against fraud or change in the valuation of the property."

There can be no reason why the presumptions of that statute cannot be urged against fraud which do not apply to the one involved in this case, and if the conclusion there reach is correct, as it certainly was, it is decisive here.

The court charged the jury that the physician who made the examination of Mr. Roloson was the agent of the company; that the law required the company to appoint a physician to make the examination before issuing the policy, and the insured had nothing to do with selecting him.

We presume that in this charge the judge referred to Section 7926, 2 R. S. Mo. p. 1852, which provides that "no corporation, company or association transacting business under the provisions of *this article* shall issue a certificate or policy to any person until the applicant has been examined by a physician duly licensed and appointed by the company as its medical examiner."

This provision is found in Article 4 of the chapter on "Insurance," referring to "Insurance on the Stipulated Premium Plan" and the incorporation and regulation of companies for that purpose, and has no reference whatever to companies incorporated under Article 3 of the same chapter [p. 1830] or foreign companies doing business in the state under the last named article. It emphasizes the fact however, that the au-

thority of the physician, so far as he represents the insurance company, is that of a medical examiner alone. He examines the applicant physically and asks him questions and reports the result of these two classes of investigation to the company. If the applicant lies to him with relation to these matters there is apparently no reason why the act is not as culpable, and its effect as for reaching in law as well as morals as if the misrepresentation had been made to any other agent of the company. If he misrepresents to his principal the act is still more henious because of the relation of trust and confidence which he sustains.

In this case, in so far as the answers of the insured were false, it made no difference that they were transmitted through the doctor. If the doctor knew of their falsity, he had no authority to waive true answers, and by transmitting them to the company and concealing their true character he became a conspirator with the applicant to perpetrate the fraud.

Cummings vs. Kennebec etc. Ins. Co. (Me.) 35 Atl, Rep. 1032;

Mattson vs. Modern Samaritans, 91 Minn. 434;

Hauf vs. Northwestern etc. Association, 76 Wis. 450;

Hudson vs. Randolph, 66 Fed. Rep. 216;

Western Mort. Inv. Co. vs. Ganzer, 63 Fed. Rep. 646;

Ketcham vs. American etc. Association, 117 Mich. 521;

N. Y. Life Ins. Co. vs. Fletcher, 117 U. S. 519.

In *Cummings vs. Kennebec etc. Ins. Co. supra*, the court, (p 1033) said: "He obtained from the medical examiner a recommendation to which he was not entitled, by means of willfully false statements, and the intentional concealment of the truth in relation to matters material to the risk. This the law denominates fraud, and sternly refuses to allow any person to profit by it."

In *Hudson vs. Randolph, supra*, the court, (p. 222) said that, "although as a general rule, the principal is bound by the knowledge of his agents, and by his acts within the scope of his authority, the principal is not bound by the uncommunicated knowledge of his agent, when the agent and parties dealing with him have colluded for fraudulent purposes, for in such cases the agent cannot be presumed to have communicated his own delinquency to the principal."

In *Mattison vs. Modern Woodmen, supra*, the court, (p. 437) in a case in which the answers of the insured had been true but as written by the agent they were untrue, said: "Whether he knew they were not true as contained in the application sent to the society was a fair question, under the evidence, for the jury to determine. If the deceased had no such knowledge, and was not aware of the fact that the agent had given his answers untruthfully, the society would certainly be bound by the knowledge possessed by the agent, and plaintiff would be entitled to recover. But on the other hand if the jury should find that the deceased knew that false and untrue answers were contained in his application, the society would not be bound by the knowledge of the agent and the plaintiff could not recover."

This states the rule as we have already stated it. If both the agent and the insured joined in giving untrue information to the company, there was fraudulent collusion in fact and proof can go no further. The statement that the physician was the agent of the insurance company is no answer to the charge of fraud.

II

Each of these policies contains a stipulation as follows: "This policy shall not be in force until the first premium is paid and the policy delivered to and accepted by the insured while in good health." This is a condition and not a representation, and if the insured was not in good health at the time of the delivery of the policy there can be no recovery in this case, and the exceptions to the courts refusal to so charge and to its charge to the contrary should be sustained.

The court charged the jury upon this point as follows: "Now if you find that at the time either of these policies were delivered to Mr. Roloson and accepted by him that he was not in good health, and that the sickness or disease from which he was suffering actually contributed to his death, then the policies never took effect, and it would be your duty to find in favor of the defendant. But if you find that he was well or in good health at the time the policies were delivered, or in case

he was not in good health, that the sickness or disease from which he was suffering did not actually contribute to cause his death, then the fact of his sickness or disease would be wholly immaterial, and so far as this provision of the policy is concerned it would still be your duty to find in favor of the plaintiffs."

From this charge it is difficult to determine whether, in the opinion of the court, if Mr. Roloson had been sick at the time the policy was delivered and accepted and, had entirely recovered, the policy would have then taken effect, or whether it would still have been necessary to wait until his death to ascertain whether it had taken effect at the time of its delivery. It is difficult to mix this clause with the statute which undertakes to deal with the effect of misrepresentations made in obtaining or securing the policy. We are assisted, however, by the fact that other judges have tried it and by their efforts the law has become settled.

Section 3625 of the revised statutes of Ohio, 1892, provides: "No answer to any interrogatory made by an applicant in his or her application for a policy shall bar the right to recover upon any policy issued upon such application or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false, and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued, and, moreover, that the agent or company had no knowledge of the falsity or fraud of such answer.

In *Metropolitan Life Insurance Company vs. Howle*, 62 Ohio St. 204 a suit on a policy containing a pro-

vision that, "No obligation was assumed by the company unless, upon the date of the policy the assured should be alive and in sound health." The trial court, in that case as in this, refused to charge unconditionally that unless the insured was in sound health at the date of the policy the jury should find for the defendant. The Supreme Court, in reversing the case for this error said: "The court mixed the law as to the condition in the policy with the law applicable to answers to interrogatories in the application and thereby committed an error. False answers to interrogatories are governed by section 3625 Revised Statutes, but that section has no application to conditions contained in the policy itself.

In a very late case in Massachusetts, where the statute (Rev. Laws, c. 118, Sec. 21), provided that no oral or written misrepresentation or warranty, made in the negotiation of a contract or policy of insurance should be deemed material or avoid the policy except in cases mentioned, the policy contained a condition as to sound health like the one in the Ohio case. The defendant asked an instruction that if the insured was not in sound health at the date of the policy the defendant was entitled to a verdict. This the court refused and proceeded to modify the condition of the policy by reference to the provision of the statute referred to. The Supreme Court, in reversing the case for refusal to give the instruction as asked, said, referring to the Ohio case just cited: "The judge in the case at bar committed the same error. He mixed the law applicable to negotiations for a policy of insurance with the law applicable to a condition in the policy itself."

There seems to be no question that in this class of policies the promise of the company is not absolute but conditional, and that the existence of good health at the time referred to is a condition precedent to the promise of insurance.

Packard vs. Insurance Co., 72 N. H. 1, 2;

Emerson vs. Metropolitan Life Ins. Co., 185 Mass., 318;

Gallant vs. Metropolitan Life Ins. Co., 167 Mass., 79;

Dwight vs. Germania Life Ins. Co., 103 N. Y., 341.

III.

The refusal the Court to permit the plaintiff in error to prove that the State Life Insurance Company of Indianapolis, had, in April 1901, declined to insure Mr. Roloson's life, was error. This fact is not such a misrepresentation as is made immaterial by the statute.

The theory of the court in excluding this evidence and in refusing to charge upon the subject is fully stated in the following paragraph from its general charge:

"In order to sustain the defense made by the insurance companies as to Mr. Roloson's representations and warranties in the written application, you must find, first, that Roloson was, or had been, afflicted

by some sickness or disease; second, that his answer as to such sickness or disease was untrue or incomplete; third, that such sickness or disease actually contributed to Mr. Roloson's death."

This means that to sustain the defense Roloson must have been sick; the false answer must have related to the sickness; and the same sickness must have contributed to his death.

The court argued that his rejection by the State Life Insurance Company could not have killed him; consequently the fact of such rejection was immaterial. The same argument applies equally to his concealment of the name of his family physician. This could not have killed him. In each case it was a call for information to enable the insurer to ascertain for itself the facts relating to the applicant's insurability. The Court holds that while the statute places upon the insurance company the burden of ascertaining at its peril all the facts before entering into the contract of insurance, it gives the applicant the express right as between himself and the company, to conceal, by positive falsehood and deceit, the sources of information as to such facts. This is a repulsive doctrine. We cannot believe that in this statute the legislature has intended to advertise a premium for fraud.

The statute provides that no misrepresentation shall be deemed material unless the matter misrepresented shall have actually contributed to the loss. We think a fair construction of its words leads to the conclusion that the utmost the legislature could have intended by their use was that the parties should be concluded by the policy as to all conditions which

might contribute to the loss, unless they should so contribute. Even this construction would place the contract, made without judicial inquiry or judicial action, upon the same footing as the judgment of a court of general jurisdiction, which, while not subject to attack by simply disputing the facts upon which it is founded, may be avoided by the showing that a party has been fraudulently deprived of means or opportunity to which he is entitled of having a fair inquiry.

Judge Krekel, in his charge to the jury in *White vs. Insurance Company*, 29 Fed. Cas., 1014, *note*, in construing this same statute said: "It cannot, we think, be supposed, that the legislature of Missouri, in the passage of the act of March 23, 1874, intended to give any sanction or protection to fraudulent practices against the insurance companies, but their intention was to extend protection to the extent therein provided, against the usual conditions in insurance policies, and to extend this protection in favor of persons who have in good faith, without any fraud on their part, or intentional misrepresentation with a view to deceive, effected insurance, by providing that it such case, immaterial misrepresentations, or those which prove to be immaterial, shall not avoid the policy."

The construction adopted by the court, would include misrepresentations as to sex, coverture, and every other fundamental condition by which an insurance company might seek to control the character of its risks, or otherwise regulate its business. Even if within the legislative power it is an unreasonable interpretation of the language used.

Mr. Roloson having warranted the truth of his statement that no insurance company had ever declined to grant insurance on his life, and that stipulation not coming within the terms of the statute relied on by the defendant in error, the proof offered presented a perfect defense to this suit.

Stephen S Brown

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John E Dolman

Attorneys for Plaintiff in Error.

NO. 34

Supreme Court of the United States

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1905.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESERN DISRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR

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American Printing Co., St. Joseph, Mo.

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STATEMENT.

This is a suit on two life insurance policies for Five Thousand Dollars each, issued by the plaintiff in error, to one Eber B. Roloson, a citizen of DeKalb County, in

the State of Missouri; the first policy is dated Nov. 21, 1901, and the second of date February 14, 1902. Roloson died testate at DeKalb County, in the State of Missouri, on the 28th day of February, 1903. Both of said policies were held by said Roloson at the time of his death, and all premiums due thereon had been paid and both were in full force and effect.

The defendants in error were by the terms of the last will and testament of said Eber B. Roloson, deceased, appointed the executors of said will, and said will was by the Probate Court of DeKalb County, Missouri, duly admitted to probate and letters testamentary were issued to the defendants in error as the executors of the said last will and testament of the said deceased, bearing date March 4th, 1903. Said executors being duly qualified as executors as required by the laws of the State of Missouri, took charge of the estate of said deceased.

On the 15th day of March, 1903, the said executors, as such, caused proofs of the death of said Eber B. Roloson, as required by the policies in suit, to be duly made out and sent to the plaintiff in error, herein, and which was within the time required therefor and which were duly received by the plaintiff in error.

Said policies did not mature so as to give defendants the right to begin a suit thereon until the 15th day of June, 1903.

All of the foregoing facts are admitted by the answer of the plaintiffs in error herein, and by the admissions made by the said plaintiff in error at the beginning of the trial in the court below.

The plaintiff in error, refused to pay either of said policies issued as aforesaid on the grounds of misrepresentations alleged to have been made by said Eber B. Roloson, in his applications for the policies concerning his health.

On the 5th day of May, A. D., 1903, and before the defendants in error had the right to begin a suit on either of the policies now in suit, the plaintiff in error filed its bill of complaint in equity against the said executors in the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division, alleging therein various misrepresentations claimed by it to have been made to the plaintiff in error, by the said Eber B. Roloson, in his applications for insurance concerning his health, and further that fraud was practiced by the said Eber B. Roloson, upon the plaintiff in error herein, in obtaining said insurance. The bill prayed for a decree of the Court cancelling, annulling and for naught holding the said policies and each of them, and that the said executors deliver the said policies up for cancellation, and that the said executors be perpetually enjoined from proceeding at law in any Court or Courts to enforce the payment of the same.

That afterwards, to-wit, on the 6th day of May, 1903, Hon. John F. Phillips, judge of said Court in Vacation, at his chambers in Kansas City, Missouri, on the presentation of said complaint, granted a restraining order against these executors, enjoining and restraining them from bringing suit in any Court upon the policies aforesaid, for the collection of same and ordered the executors, to show cause at his chambers on the 25th day of May, 1903, if any they had, why a preliminary injunction should not be granted according to the prayer of said bill of complaint.

That on the 6th day of May, 1903, said temporary restraining order was served upon the said executors by the marshall of the district; and subpoenas were also served on said executors, on said 6th day of May, 1903, commanding said executors to be and appear at Rules to be held at the office of the Clerk of said Court in St. Joseph, Missouri, on the first Monday in June, 1903; then and there to answer said bill of complaint.

On the first day of June, 1903, said executors entered their appearance, according to said subpoenas, in said cause, by their counsel.

That on the 25th day of May, 1903, these executors appeared before the said, the Hon. John F. Phillips, Judge, at his chambers in Kansas City, Missouri, and after arguments from plaintiff in error and the defendants in error, by their respective counsel, the said John F. Phillips, judge, on the 5th day of June, 1903, granted a temporary injunction against the said executors prohibiting them from suing in any Court for the enforcement of said policies or either of them, until the further orders of said Court, which was at once issued and served upon the said executors.

That thereafter, on the 17th day of June, 1903, these executors, having duly excepted to the order of said Circuit Court in granting said injunctions, filed their assignment of errors in the said Court, and also their petition for an appeal to the United States Circuit Court of Appeals for the 8th Circuit, and said appeal was by the said Court duly granted, and the record in said cause was by the said Circuit Court ordered to be sent to said Court of Appeals.

That said cause was heard in the said Circuit Court of Appeals at St. Louis, Missouri, on the 23d day of March, 1904, and the order of the said John F. Phillips as Judge, in awarding the said temporary injunction, and prohibiting these executors from suing on said policies at law was reversed.

That afterwards on the 9th day of May, 1904, the said plaintiff in error applied to this Honorable Court for a writ of certiorari to the said United States Circuit Court of Appeals for the 8th Circuit, in said cause, and this Honorable Court after duly considering all of the matters and things suggested therein, denied the said writ on the 31st day of May, A. D., 1904. See 194 U. S. 637, case No. 685.

That thereafter on the 21st day of September, 1904, the next term of the DeKalb County Circuit Court being in October, 1904, the defendants in error began this suit in the Circuit Court of DeKalb County, Missouri, against the plaintiff in error herein, for the recovery of the amounts due on said policies.

Due service being had on the defendant therein, it did at the October, 1904, Term of the said DeKalb County Circuit Court, file its petition for removal of said cause to the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division. Which said removal was granted as petitioned for.

That thereafter at the March Term, 1905, of the said Circuit Court of the United States, a trial of this cause was had before the Hon. Chas. F. Amidon, Judge and a Jury, which trial resulted in a verdict and judgment for the defendants in error as executors aforesaid, for the amount due on the policies sued on and herein before mentioned, in the sum of $11,050.00. with 6 per cent interest thereon from the date of judgment.

That thereafter, and within the time given by the trial Court, the plaintiff in error sued out a writ of error to this Court.

Our purpose of making a full statement of the previous litigation involving this matter will fully appear from our argument in the case.

BRIEF.

I.

The statutes of Missouri contain two sections concerning misrepresentations both of which are identical in their wording and together they cover all classes of life insurance. R. S. Mo., 1899, Sections 7890 and 7936, said sections read as follows:

"MISREPRESENTATIONS.— No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case, shall be a question for the jury."

The next succeeding section of the statutes of Missouri is as follows:

Sec. 7891. DEFENSE IN CASE OF SUITS.—In suits brought upon life policies, heretofore or hereafter issued, no defense based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court for the benefit of the plaintiffs, the premiums received on such policies."

Certain duties are required of foreign insurance companies, as follows:

"Sec. 7933, R. S. Mo., 1899. FOREIGN CORPORATIONS.—No corporation, company, association or society organized under the laws of any other state or territory of the United States, or the District of Columbia, or foreign company shall transact business under the provisions of this article until it has received from the superintendent of insurance a certificate of authority to do business in this state, a duplicate of which shall be filed in his office. The superintendent of insurance shall annually issue to such foreign corporation, company or association, renewal certificates of authority to continue business, if it shall have fully complied with the provisions of this article, and if the superintendent shall be of the opinion that any such corporation, company

or association is not entitled to a renewal of a certificate of authority, he shall cite the same to appear, giving reasons therefor, and to show cause why the certificate of authority should be renewed; and unless the certificate of authority shall be renewed within thirty days after such hearing, such foreign corporation, company or association or society shall cease to do business in this state. When any state, territory or foreign country shall impose any obligations upon any such corporation of this state, or their agents transacting business in such other state, territory or foreign country, the like obligations are hereby imposed upon similar corporations of such other state, territory or foreign country, their agents or representatives transacting business in this state; and such corporation, company, association or society of such other state, territory or foreign country, and its agents and representatives shall pay all licenses, fees or penalties to, and make deposits with the superintendent of insurance imposed by the laws of such other state, territory or foreign country upon any corporation of this state doing business therein; and in case of failure to pay the same, the superintendent shall refuse the certificate of authority herein provided for or cancel such certificate, if one shall have been previously issued. No foreign corporation, company, association or society shall be authorized to transact any business authorized by this article within this state, unless it furnish evidence satisfactory to the superintendent of insurance that it has a reserve or emergency fund equal in amount to that required by this article, and the same is held for the benefit of policy-holders only, and invested as required by the insurance laws of its home state. Neither shall any foreign corporation, company, association or society be authorized to do business in this state under this article, unless it collects in advance for the benefit of its policy-holders a net premium equal to at least that provided for by the terms of this article. Provided, that all such foreign corporations shall annually pay a tax on the gross premiums received in this state on account of business done in the state at the rate of one per centum per annum, which shall be in lieu of all other taxes as herein otherwise provided, said tax shall be levied and collected as is provided for in the collection of taxes on other insurance companies."

GENERAL PROVISIONS.

"Sec. 7989. COMPANIES PROHIBITED FROM DOING BUSINESS WITHOUT CERTIFICATE.—No company shall transact in this state any insurance business, unless it shall first procure from the superintendent of the insurance department of this state a certificate stating that the requirements of the insurance laws of this state have been complied with, authorizing it to do business; a copy of which certificate, certified by the superintendent, and issued only upon the request of the president or secretary, or other chief officer of the company, or of a general agent of the company for this state, notice of whose appointment has been filed in the department, shall be held by every agent or solicitor for such company doing business for such company within this state, and such copy shall, in some convenient and distinct manner, set forth the name of the person, agent or solicitor for whose use it is issued. Every such company shall be required to procure annually, for the use of its agents and solicitors, copies of the renewed certificate of authority, provided for by law."

"Sec. 7990. ALL COMPANIES TO CONFORM TO THIS LAW. No individual or association of individuals, under any style or name, shall be permitted to do the business mentioned in this chapter within the State of Missouri, unless he or they shall first fully comply with all the provisions of the laws of this state governing the business of insurance. No company organized under the provisions of this chapter, or any general law of this state, shall undertake any business or risks, except as in this chapter provided; and no company organized or incorporated by or under the laws of this or any other state of the United States, or any foreign government, transacting the business of life insurance, shall be permitted or allowed to take any other kind of risks except those connected with or appertaining to making assurance on life, and the granting, purchasing and disposing of annuities and endowments, and the making of insurance against accidents to persons by life insurance companies, as provided in Section 7852, or do any business connected with the kind of insurance mentioned in either of the other classes: Provided, that no company now doing business in this state, and complying with the provisions of this chapter, shall be prevented from continuing the same; and provided further, that any fire insurance company now organized under the laws of this state, or authorized to work in this state, may add to the

business now being done by it, assurances upon property against loss or damage by lightning and wind-storm."

The various classes of life insurance are defined by the statutes of Missouri as follows:

"Sec. 7853. VARIOUS COMPANIES DEFINED.—Corporations doing the business mentioned in the preceding section, which are owned and controlled entirely by the stockholders, and in neither the management nor the profits of which the policy-holders participate, shall be considered joint stock companies; such corporations having no capital stock and in the management and profits of which the policy-holders alone participate, shall be considered mutual companies; and such corporations having a capital stock, but in the management or in the profits of which, or in both, the policy-holders or any class or classes of policy-holders are or may become entitled to participate, shall be considered stock and mutual companies."

"Sec. 7926. EXAMINERS, BENEFICIARIES, ASSIGNMENT OF POLICY.—No corporation, company or association transacting business under the provisions of this article shall issue a certificate or policy to any person until the applicant has been examined by a physician duly licensed and appointed by the company as its medical examiner, nor unless the beneficiary named in the certificate or policy is the husband, wife, legal representative, relative, heir, creditor or legatee of the insured, or who may have an insurable interest in the insured. The beneficiary named in the certificate or policy may be changed as may be provided for in the article of incorporation or by-laws, except that no change shall be made from a wife to a creditor without her written consent. And in the event of death after any policy of insurance issued by any corporation, company or association, doing business under the provisions of this article after said policy has been in force for the period of three full years, then such policy of insurance shall be incontestable for any cause."

"Sec. 7890 is in no manner modified by the statutes of Missouri except by Sec. 7896 in reference to Suicide where the act was contemplated at the time of the application for the policy, which section is as follows:

"Sec. 7896. SUICIDE NO DEFENSE, WHEN.—In all suits upon policies of insurance on life, hereafter issued by any company doing business in this state, to a citizen

of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

II.

Plaintiff in error has assigned fifty-five (55) errors in this cause, which are divided into three sub-divisions, viz.:

a. Twenty-five (25) exceptions as to the admission and rejection of testimony in the trial Court:

b. Twenty one (21) exceptions to the refusal by the Trial Court of charges requested;

c. Nine (9) exceptions to charges given by the Trial Court.

All of which go to but one point in the case and that is as to whether or not Section 7890, R. S. Mo. 1899, is in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, in this that it conflics with the last sentence of the Section, which is as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The plaintiff in error, as shown by the record, is a corporation organized under the laws of Minnesota and is authorized to do business in Missouri, under the statutes of Missouri, governing the licensing of foreign insurance companies, in that state.

The amendment to the constitution referred to, has no

application to a foreign corporation. A foreign corporation is not a citizen within the meaning of that section of the constitution and the states have a right to impose whatever conditions they see fit to impose upon foreign corporations doing business in the state.

Cable vs. United States Life Ins. Co., 191 U. S. 288.
Blake vs. McClung, 172 U. S. 239.
Orient Ins. Co. vs. Daggs, 172 U. S. 557.
Waters-Pierce Oil Co. vs. Texas, 177 U. S. 28.
New York Life Ins. Co. vs. Craven, 178 U. S. 389.
Hancock Mut. Life Ins. Co. vs. Warren, 181 U. S. 73.

Were the application of the law as to foreign insurance companies otherwise than as stated above, even then the plaintiff in error would not be entitled to the relief asked, for the reason that Section 7890, R. S. Mo. 1899, applies to all persons in like circumstances and conditions, and all insurance companies whether foreign or domestic.

This question was passed on by this Court in Hibben vs. Smith, 191, U. S. l. c. 325, in which the following language is used:

"The provisions of the Fourteenth Amendment do not cover such an objection as is now under consideration. The general system of procedure for the levying and collection of taxes which is established in this country is, within the meaning of the Constitution, due process of law. Kelly vs. Pittsburgh, 104 U. S. 78. A provision made by the legislature of a state in relation to the manner of levying an assessment for a local improvement is within this principle a proceeding for the levying and collection of taxes, and unless it be in violation of some particular provision of the Federal Constitution, it will be upheld in this Court. The Fourteenth Amendment, it has been held, legitimately

operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress; but that the Federal Courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a State applicable to all persons in like circumstances and conditions, and that the Federal Courts should not interfere unless there is some abuse of law amounting to confiscation of property or a deprivation of personal rights, such as existed in the case of Norwood vs. Baker, 172 U. S. 269. These principles have been reiterated in a series of cases reported in 181 U. S., commencing with French vs. Barber Asphalt Paving Co., at page 324 of that volume."

See also Mo. Pac. Ry. Co. vs. Humes, 115 U. S. 512.
Mo. Pac. Ry. Co. vs. Mackey, 127 U. S. 205.
Ry Co. vs. Herrick, 127 U. S. 210.

III.

The plaintiff in error also contends for a different construction of Section 7890, R. S. Mo. 1899, than is given by the Courts of Missouri. The Courts of the United States are controlled as to the interpretation of state statutes by the decision of the Court of last resort of the state and will form an independent judgment as to their meaning only when no such construction has been had.

Town of Enfield vs. Jordan, 119 U. S. 680.
Bank vs. Penna. 167 U. S. 461.
Hartford Ins. Co. vs. R. R. Co., 175 U. S. 91.
McCain vs. Des Moines, 174 U. S. 177.
Orr vs. Guilman, 183 U. S. 283.
Sioux City R. R. Co. vs. N. A. Trust Co., 173 U. S. 107.

IV.

A foreign insurance company doing business in Missouri is governed by the laws of Missouri, as to the interpretation of its contract. The laws of Missouri become a part of the contract.

Fletcher vs. New York Life Ins. Co., 13 Fed. 526.
New York Life Ins. Co. vs. Fletcher, 117 U. S. 519.
John Hancock Mut. Life Ins. Co. vs. Warren, 181 U. S. 73.
Equitable Life Assur, Soc. vs. Pettus, 140 U. S. l. c. 233-4.
New York Life Ins. Co. vs. Cravens, 178 U. S. 389.
Orient Ins. Co. vs. Daggs, 172 U. S. 557.

V.

The Missouri statute (Section 7890) has been interpreted by the courts of last resort of Missouri and given the meaning placed upon it by the trial judge in his charge to the jury.

Schuermann vs. Insurance Co., 165 Mo. 641.
Kern vs. Legion of Honor, 167 Mo. 471.
Jenkins vs. Covenant Mutual Life Ins. Co., 171 Mo. 375.
Smith vs. Mut. Ben. Life ns. Co., 173 Mo. 329.
Herzberg vs. Brotherhood, 110 Mo. App. 328.

VI.

The plaintiff in error also finds fault with the trial court in its definition of the term "good health." This definition is fully sustained by the case of Boward vs. Bankers' Union, 94 Mo. App. 442, and by Goucher vs. Northwestern T. M. Ass'n, 20 Fed. l. c. 598.

VII.

The charge of the trial judge to the jury to the effect that if they found that at the time either of the policies in suit were delivered to Mr. Roloson and accepted by him that he was not in good health, and that the sickness or disease from which he was suffering, actually contributed to his death, then the policies never took effect, but that if he was not in good health and that the sickness or disease from which he was suffering did not actually contribute to cause his death, then the fact of his sickness or disease would be wholly immaterial was a correct statement of the law. The Court by so holding, declared the law to be that the statute which governed the effect of representations and warranties in the application, also governed the delivery of the policy. In other words that the acceptance of the policy by the assured amounted to a representation that he was in good health at the time he received it and that the statute also applied to such representation. This question has not been directly passed upon by the courts of last resort of Missouri, but the same principle has been determined in Jenkins vs. Covenant Mut. Life Ins. Co., 171 Mo. l. c. 382-3. That was a case where the assured after the lapse of his policy was reinstated upon furnishing a certificate of good health.

The Court l. c. 382-3 uses the following language:

"It is also contended that the statute does not apply to either warranties or representations inducing or constituting a part of the contract of reinstatement; but only to representations made on the issuance of the policy, and the statute, being in derogation of the common law, must be strictly construed. We are not, however, impressed with the force of this position, but think the statutes should be given a more liberal construction, so as to include cases of reinstatement, as well as original applications. They are

practically the same, and should be governed by the same rules."

"There is no doubt but that the same general rules which govern representations under the original contract would apply to a modification or alteration thereof." (2 Joyce on Insurance, sec. 1935.)"

"Each renewal of a policy of insurance is a new contract, and is subject to the local laws in force at the time of the renewal." (Brady vs. Ins. Co., 11 Mich. 425.)"

"A renewal of a policy of insurance is, in effect, a new contract of assurance." (Hartford Fire Ins. Co. vs. Walsh, 54 Ill. l. c. 167.)"

VIII.

R. S. Mo. 1899, Sec. 7890 applies to both misrepresentations and warranties.

Deane vs. Mut. Life Assn, 86 Mo. App. 459.
Jenkins vs. Covenant Mut. Life Ins. Co., 171 Mo. 375.

This case fully sustains the charge of the trial court as to misrepresentations and warranties.

IX.

Section 7890 supra,. covers all misrepresentations whether innocent or fraudulent, and limits defenses to misrepresentation only, of such conditions as actually contribute to the death of the assured.

The plaintiff in error contends for the same construction or Section 7890 as was given it by the Kansas City Court of Appeals in the cases of Ashford vs. Insurance Co.,

80 Mo. App. 638 and Van Cleave vs. Union Casualty & S. Co., 82 Mo. App. 668, and contends that the questions they present have never been passed upon by the courts of Missouri. These cases are expressly overruled by the Supreme Court, in th case of Kern vs. Legion of Honor, 167 Mo. l. c. 488. In the case of Ashford vs. Insurance Company, supra., the Court of Appeals in a very elaborate opinion hold that there is a distinction between innocent and fraudulent misrepresentations and that the statute of Missouri, Section 7890, applies only to innocent misrepresentations and argue much as does the plaintiff in error in this case. The Supreme Court of Missouri in the case of Kern vs. Legion of Honor, supra., speaking of the Ashford case and of Van Cleave vs. Union Casualty & S. Co., 82 Mo. App. 668, say:

"If those cases correctly state the law, the statute quoted is a dead letter, and a new defense is afforded insurance companies. Under such a construction, the only thing an insurance company would have to do would be to provide in the contract of insurance that the assured warranted the truth of all statements and answers then it could collect the premiums as long as the assured lived, and after his death, defeat the policy by showing that the statements and answers were untrue and by the terms of the contract were warranted to be true and that they were fraudulently made, notwithstanding the misrepresentations in no manner contributed to the contingency or even on which the policy was to become due and payable.

Such is not the law or the proper construction to be placed on the statute. The statute was enacted to correct the evil that had grown up, of permitting insurance companies to make every statement or answer a warranty, and if any one, however trivial or however foreign to the risk or loss, turned out to be untrue, to avoid the policy without refunding the benefits the company had received. The statute draws no distinction between innocent and

fraudulent misrepresentations, and the courts have no right to draw any such distinction. The test applied by the statute is whether "the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable," and the power to determine that question is vested by the statute in the jury, and not in the court."

The Court then quoted extensively from the Ashford case where the Court of Appeals attempted to construe the case of Christian vs. Insurance Co., 143 Mo. 460 into insinuating that there was a distinction between innocent and fraudulent misrepresentations, and then say:

"This is a misapprehension of the meaning of the language used, the reasoning employed and the result announced in the Christian case. In that case no distinction was drawn, or intended to be permitted, between innocent and willfully fraudulent misrepresentations. The purpose was to give full force and effect to the statute, and to hold that no misrepresentation, whether innocent or fraudulent, when based upon a warranty of truth by the terms of the policy or not, shall be a defense," unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable.' ' To avoid all possible confusion and misunderstanding the cases of Ashford vs. Ins. Co., 80 Mo. App. 638, and Van Cleave vs. Union Casualty & S. Co., 82 Mo. App. 668, are expressly disapproved and overruled."

X.

Before the enactment of Sec. 7890 and 7891, R. S. Mo. 1899, the Courts of Missouri held that any misrepresentation, no matter how immaterial if by the contract of insurance, it was made a warranty, it must be literally true, or the policy would be avoided by the Court.

Whitmore vs. Sup. Lodge K. & L. of H., 100 Mo. 36; and cases cited.

This was the general rule concerning warranties.

3 Joyce Ins. Sec. 1944, and cases note 2.

Secs. 7890 and 7891, R. S. Mo. 1899, were first enacted in Missouri in 1874, and appeared in the Revision of 1879, as Secs. 5976 and 5977 and were carried forward in the Revision of 1889, as Secs. 5849 and 5850, and now appear in Revision of 1899, as Secs. 7890 and 7891, and said sections cover all companies whether foreign or domestic.

In the opinion of the legislature of Missouri, there was a necessity for their adoption; the Missouri Supreme Court, in the case of Schuermann vs. Insurance Co., 165 Mo. l. c. 653, in giving the purpose of said Sec. 7890, used the following language, viz:

"As said before, life insurance companies in this State prior to the adoption of Section 7890, could, and by a practice almost universal, did, insert in their policies a stipulation to the effect that any untrue statement or answer made by the applicant for insurance (regardless of its materiality, or regardless of the intent of the applicant in making same), should avoid the policy and too frequently when demands were made upon them for the obligations of the policies the companies availed themselves of these harsh provisions without a return by them of the money which they had obtained from the insured in his lifetime, and when the untrue statements made, had little, if any, effect upon the risk undertaken by the insurer. This doctrine of warranties in the extent to which it had grown and was applied, was something peculiar to insurance companies, and was therefore thought the subject of special legislation, in a law which properly undertook to affect insurance companies alone in that particular. By a long

and hurtful practice of a given policy peculiarly their own, insurance companies had stamped themselves as a class, to which alone legislation might properly address itself in that regard."

The above reason is quoted and cited with approval, in Jenkins vs. Mut. Life Ins. Co., 171 Mo. 1, c. 383-4.

XI.

The Court properly charged the jury in these words:

"Gentlemen, I charge you that the physicians who made these examinations of Mr. Roloson, were the agents of the insurance company. The law required an insurance company to appoint a physician, to make such examination, before issuing the policy. Mr. Roloson had nothing to do with selecting those physicians. They were the agents of the Company." Record 349.

The examining physician is the agent of the Insurance Company.

R. S. Mo. 1899, Section 7929. **Examiners, Beneficiaries, Assignment of Policy**—No corporation, company or association transacting business under the provisions of this article, shall issue a certificate or policy to any person until the applicant has been examined by a physician, duly licensed and appointed by the company as its medical examiner, nor unless the beneficiary named in the certificate or policy is the husband, wife, legal representative, relative, heir, creditor or legatee of the insured, or who may have an insurable interest in the insured. The beneficiary named in the certificate or policy, may be changed as may be provided for in the articles of incorporation, or by-laws, except that no change shall be made from a wife to a creditor, without her written consent and in the event of death,

after any policy of insurance issued by any corporation, company or association, doing business under the provisions of this article, after said policy has been in force for the period of three full years, then such policy of insurance shall be incontestable for any cause."

Franklin Life Ins. Co. vs. Galligan (Ark.) 73 S. W. 102.

This case holds that the examining physician is the agent of the Company and if he knows the answers given in the application are false, the Company is estopped to deny their falsity.

Sternamann vs. Met. Life Ins. Co., 170 N. Y. 13; 62 N. E. 763.

Leonard vs. State Mut. L. Soc., 24 R. I. 7; 51 Atl. 1049.

Otto vs. Hartford Life Ins. Co., 88 Minn. 423; 93 N. W. 608.

XII.

The first and second assignments of error, referring to the deposition of W. F. Bechtel, make objections which are intended to call for a review of Section 7890, R. S. Mo. 1899 and which has been fully discussed in the preceding paragraphs of this brief.

XIII.

The third assignment of error is in reference to the deposition of Dr. J. W. Baker. It will be seen by reference to pages 36 and 37 of the record that the plaintiff below, defendant here, did object to that testimony, but that the objection was overruled by the Court. It is therefore plain that the plaintiff in error has nothing to complain of in that respect.

XIV.

The fourth assignment of error is based upon an attempt of the defendant below to prove by the witness, Austin Craig, the general conversation among the people of Weatherby, respecting the health and appearance of Eber B. Roloson. The statement in the first instance was a voluntary statement by the witness and upon the motion of the plaintiff below, was stricken out, and properly so, as it was incompetent to prove health by repeating what the witness termed "general conversation," and especially under the provisions of R. S. Mo., Sec. 7890 (see page 50 of Record).

XV.

The substance of the fifth assignment of error is found at page 72 of record. John Redmond was the witness of the plaintiff in error. The witness was asked the following questions on cross examination:

Q. Now, Mr. Redmond, your mind is impressed with his condition at the time his wife died, at the time he was leaning on the hitching rack there? A. Well, that is one time.

Q. Another time that impressed your mind was his condition when he met with his losses, just before he died? You saw him about then just before he took to his bed?

Mr. Brown: "If the Court please, we do not think it proper for the gentleman to assume facts that are not in evidence and that may be material one way or the other. He has assumed that he met with losses just before he died and that may be a separate material fact in itself."

The Court: "There is some evidence in the case already that he met with losses. The objection is overruled. He may answer."

The question was entirely proper under all of the evidence and evidence was later introduced by the plaintiff below, showing in detail the losses of Mr. Roloson, about the time he was taken with his fatal illness.

XVI.

The Sixth assignment of error is with reference to the testimony of George Price, a farmer, who lived some seven or eight miles from Weatherby, and only saw the assured once in a while, when he was at Weatherby. The question referred to is as follows:

Q. Have any of your family ever had consumption?

Mr. Randolph: "We object, if the Court please, as to whether the witness' family had consumption."

The Court: "I do not see what that has to do with it."

Mr. Kerr: "My purpose was to show whether this man was acquainted with the physical appearance of consumptives, and how those physical conditions of consumptives compared with the physical condition of this man."

The Court: "The objection is sustained and anything else in answer to the same kind of questions. (See printed record, page 75.) This testimony was properly excluded. The witness could not be qualified as an expert in the manner attempted.

XVII.

The seventh assignment of error (Record page 129), has reference to the following question asked by the plaintiff in error:

Q. You may state from your examination and the general appearance of the man and the history that he gave

you, whether you regarded him as a first-class risk for life insurance at that time?

Objected to by plaintiff.

Which objection was by the Court sustained.

The subject of injury was not as to whether or not he was a first-class risk in the judgment of Dr. Isaacs, but whether he was afflicted with disease and if so, whether such disease contributed to his death. R. S. Mo. 1899, Sec. 7890.

XVIII.

The Eighth assignment of error refers to the exclusion of two letters written by Dr. G. W. Isaacs, one of the witnesses for the defendant below, addressed to the State Life Insurance Company, Indianapolis, Indiana. (See pages 140-141 printed record.)

These letters were properly excluded. That Company was not the company sued in this case.

The medical examination was not made in this case and the statement of the witness made in writing could not be used, the witness himself being present and the only subject of inquiry being the physical condition of Eber R. Roloson at the date of the issuance of the policy, what disease, if any, he was then afflicted with, and whether or not such disease actually contributed to his death.

XIX.

The Ninth assignment of error refers to the same matter, only to a letter of later date and should be governed by the same rule.

XX.

The Tenth assignment of error refers to certain offered testimony of Dr. Isaacs, shown at pages 142 and 143 printed record. That testimony and the connection in which it was offered will appear from the following.

Q. In reply to the question upon cross examination, I believe you stated that Mr. Eber Roloson never asked you to make a false statement in the application. You may state now what, if any, conversation you had with Mr. Roloson, or with Mr. De Hart, or with any other party that was with Mr. Roloson, in his presence, in reference to passing him? A. Well, about all that was said, Mr. Roloson was anxious to be passed and his friends were anxious that he should get insurance.

Q. What friends, if any, made any such statement to you in Mr. Roloson's presence? A. Well, if my memory serves me right, Mr. De Hart told me he would like to see Mr. Roloson get the insurance, as a friend, and it seems to me like there was some one else.

Mr. Randolph: We object to the statement of other parties. It would make no difference, any way, because of the statute that has been called to the Court's attention. The statement of Mr. De Hart would not be competent, and we ask that his statements that his friends were anxious he should have insurance, be stricken out.

The motion is granted as to Mr. De Hart, and the motion is granted as to the other parties also.

It is plainly apparent that the court ruled correctly in this particular.

XXI.

The Eleventh assignment of error is as to matters shown at pages 144-5 printed Record. In speaking of the

correspondence with the State Life Insurance Company the defendant below asked certain questions and received certain answers and certain objections were made, as follows:

Q. You may state, Dr. Isaacs, if you received a request from the company for further examination of Roloson? A. I did.

Q. Did you make further examination? A. I did.

Q. Did you furnish the company further information as to his condition?

Mr. Randolph: We object to that and ask that it be stricken out on the ground that his correspondence with the company is incompetent to effect in any manner Mr. Roloson's physical conditon.

The Court: We have not got to that yet. I think these preliminary matters are competent. The objection is overruled for the present.

Q. What was the nature of your communication to the company in respect to Mr. Roloson as a risk, favorable or adverse?

Mr. Randolph: We object to that. This is not the company that is defendant in this suit.

The Court: The objection is sustained.

The bare statement of this question shows why it was properly refused by the Court. The witness was asked to state the nature of a written communcation, which communication in itself was incompetent, as the witness was there present to state the condition of the assured and could not refer to letters he himself had written in corroboration of his own evidence as to Roloson's physical condition.

XXII.

The deposition of Paul S. Knowles mentioned in the Twelfth assignment of errors was properly rejected. (See page 149 printed record.)

XXIII.

The deposition of Harvey R. Ellsworth mentioned in the Thirteenth assignment of errors was properly excluded. (See pages 149-150 printed record.)

XXIV.

The Probate records of De Kalb County ,Missouri, mentioned in the Fourteenth assignment of errors were properly excluded. They did not in any manner tend to throw any light upon any issue which could properly have been tried in this case, under the laws of Missouri.

XXV.

The will of Eber R. Roloson mentioned in the Fifteenth assignment of errors was properly excluded for the same reason. (See pages 164-165 printed record.)

XXVI.

The Sixteenth assignment of error (Record page 166). This evidence was properly excluded. The offer was not made in proper form and was not competent, as there was no issue in this case as to something which might have taken place between the assured and some other life insurance company.

XXVII.

The Seventeenth assignment of error (Record page 169). This testimony was part of the **Res gestae**, and was

stated by the witness Wolcott in describing what occurred between himself and Mr. Roloson when the policies in this suit were issued. Said Wolcott was the agent for the plaintiff in error.

XXVIII.

The Eighteenth assignment of error (pages 295, 296, 297, 298 of printed record). It will be seen by reference to the record that this assignment of errors does not fairly represent what occurred when the witness Packard testified and it will also be further seen that he was cross-examined as to the same matter and even more in detail than was asked by the plaintiff below. It was entirely competent for the witness to refresh his memory in the manner shown by the record.

XXIX.

The Nineteenth assignment of error (same pages of record as last stated), refers to the same matter and will be governed by th same rules.

XXX.

The Twentieth assignment of errors (page 303 of record). It was entirely competent, for the witness Packard to state that Eber B. Roloson had no other farm and no other bunch of cattle and that he would have known it had such been the case.

XXXI.

The assignment of error number Twenty-two. The matter referred to is shown at page 303 of printed record. There was no such testimony as is referred to by this assignment of error. The witness did testify as to the amount

of drafts he paid for certain car-loads of cotton-seed meal, but not as to corn. The testimony given, as will appear from the record, was entirely competent and in no manner could prejudice defendant below.

XXXII.

The assignment of error number twenty-two (see printed record, pages 305, 306, 307) is purely captious, and the same may be said of assignments of error numbers 23, 24, 25.

XXXIII.

The other assignments of error refer to the requests of the plaintiff in error to the Court as to the law to be given to the jury and as to the charge of the Court to the jury. The charge of the Court should be taken as a whole, and when so taken, it is complete and brings out every point under the law which governs this case and clearly and fairly presents every issue to the jury.

The constitutional question which is the basis of this appeal has been well settled for a great many years by a long line of well considered cases in this court. And in fact, all questions upon which the writ of error in this case is based, has been repeatedly passed upon and settled by an unbroken line of decisions of this court and of the courts of last resort of the State of Missouri. The plaintiff in error has raised no new questions, and when all the litigation in reference to the policies in suit is considered from the time of the filing of the bill of complain in equity by the plaintiff in error praying that the executors be enjoined from bringing suit to enforce the payment of the policy, all of which is fully set out in the statement herein, we are forced to believe that this long continued litigation

was begun and has been continued by the plaintiff in error for the sole purpose of delay and that by vexatiously refusing to pay the policies induce the defendants in error to compromise rather than to continue in litigation. The defendants in error therefore, believe that under all the circumstances, that this court should affirm the judgment and adjudge to them just damages for their delay and double costs. U. S. Compiled Statutes, 1901, Section 1010.

Further the defendants in error submit that the plaintiff in error has failed to properly raise a constitutional question by the record in this case, for the consideration of this court. The exceptions of plaintiff in error, and their assignments of error only say **that Sec. 7890, R. S. Mo. 1899, is in violation of section one of the 14th amendment of the Constitution of the U. S. It fails to say what particular part of said section one is violated; it fails to state in what way it is violated by the Missouri statute; it failed to show to the trial court how or in what manner said statute violated the U. S. constitution. The allegation is only made to give this court jurisdiction.**

The plaintiff in error is, and as a matter of right should be, required to specifically point out to the trial court the way and **manner** in which said section 7890 violates the Fed. Constitution.

If the question is not properly and specifically raised in the trial court, this court will not consider it.

As to exceptions to charges, this court has held, in Conn. Mut. Life Ins. Co. vs. Union Trust Co., et al, 112 U. S. 250, l. c. 261, "The attention of the court should have been called to the particular point by something more definite than the general exception taken," citing numerous cases.

This was in reference to exceptions to charges.

The proposition should be applied with even more strictness in this class of cases, as the jurisdiction of this court clearly depends upon fact of a federal question being raised by the record.

Respectfully submitted.

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